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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRAVIS WARD,
Petitioner
v.
SENTRY TITLE CO., INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

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No.

TRAVIS WARD,
Petitioner

vs.

SENTRY TITLE CO., INC.
HOME ENGINEERING, INC. AND
ALAN D. WHATLEY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Fifth Circuit in the above entitled case, entered September 26, 1983, and reaffirmed on March 12, 1984.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit Court of Appeals violated equitable principles recognized by this Court and violated the *Erie* doctrine[1] in its opinion reversing the District Court's interpretation of substantive Texas law regarding constructive trusts?

2. Whether the Circuit Court violated well established judicial policy regarding appellate review and the Federal Rules of Civil Procedure[2], in reversing the District Court's decision without challenging material facts as clearly erroneous, in inferring material facts which are not in the record, and in sifting through evidence in an illogical sequence without proper inferences leading to *prima facie* validity of the Court's conclusions?

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[1]*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937).

[2]FedR.Civ. P. 52 (a), 28 U.S.C.

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TABLE OF AUTHORITIES

STATUTORY PROVISIONS

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported at 715 F.2d 941 (1983). The Court of Appeals rendered an additional opinion on Motions for Recall of Mandate. (Appendix A).

The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Texas, Dallas Division, is not reported. (Appendix B).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 26, 1983. The Fifth Circuit's additional opinion on Motions For Recall of Mandate was issued on March 12, 1984.

Suggestions for rehearing en banc and motion for panel rehearing were denied on October 26, 1983. On November 16, 1983, the appellee's motion for stay of mandate was denied.

On January 21, 1984, and February 14, 1984, this Court granted extensions of time in which to file Petition for Certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Rules of Decision Act, 28 U.S.C. §1652 (1976):

§1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.:

RULE 52. Findings by the Court

(a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and

state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

This appeal is an interpleader action to determine the proper distribution of proceeds from a foreclosure sale of real property. The case was removed from a Texas state district court to federal court when the I.R.S. asserted a claim against the proceeds, 28 U.S.C. §§1340, 1345, and remained there after the I.R.S. achieved satisfaction of its claims. The district court found it would be in the interest of justice to allow the case to remain in federal court rather than delay the litigation further by a remand to state court.[3]

Petitioner claims that the Respondent initially bought the property as his agent, and that Petitioner is therefore entitled to the proceeds in question herein.[4]

This case presents the question of whether an individual[5] having a fiduciary relationship with a business associate,[6] and who acquires property for the use and benefit of that associate, with that associate's funds, should be awarded with the proceeds of a foreclosure sale on that property, when that individual breached his fiduciary duty by asserting personal ownership of said property.[7] The District Court imposed a constructive trust in favor of Petitioner on the proceeds from the foreclosure sale of the property.

In July of 1970, Respondent purchased the Dyckman property[8] in the name of Home Engineering, Inc., which later conveyed

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[3] *Harris v. Sentry Title Company, Inc.*, 715 F.2d 941, 943, 945 (5th Cir. 1983). (hereinafter referred to as "Sentry Title Company")

[4] *See, e.g.*, Sentry Title Company, *supra* at 945; District Court Finding of Fact No. 24; District Court Conclusion of Law No. 7; Amended Proposed Findings of Fact and Conclusions of Law at Findings of Fact No. 7, 8, 9, 12 (Appendix C).

[5] Respondent.

[6] Petitioner.

[7] The facts asserted herein are based on none other than the unchallenged Findings of Fact of the District Court which were specifically accepted by the Court of Appeals. See generally, Opinions of Court of Appeals and Dissenting Opinions; District Court Findings of Fact and Conclusion of Law.

[8] The property which was ultimately sold at the foreclosure sale.

it to Sentry Title Company, Inc., entities both owned and controlled by Respondent. The property was purchased pursuant to an agreement with Petitioner Ward that Respondent would take and hold this particular property for the use and benefit of Petitioner. The relationship in agreeing to acquire the property on behalf of Petitioner was recognized by the District Court as constituting a fiduciary relationship. The Court of Appeals specifically accepted this finding of fact by the District Court. *Sentry Title Company, supra* at 948. Moreover, the Court of Appeals recognized that Petitioner controlled the actions taken on his behalf with respect to the property. *Id.* at 949.

The expenses incurred in the process of acquiring said property, as well as the $5,000.00 down payment consideration for purchase of said property, was provided by Petitioner Ward. Moreover, prior to Respondent's breach of his fiduciary duty to hold said property for Petitioner Ward, Respondent billed Petitioner for expenses associated with the property, as well as interest payments[9] pertinent to the financing of the property.

Finally, subsequent to being informed that Respondent intended to assert personal ownership in the property[10] and upon being informed that Respondent's bare legal title to said property was about to be terminated through a foreclosure sale and that Petitioner's rightful ownership might be usurped by a *bona fide* purchaser at said sale, Petitioner purchased said property to protect his equitable interest at the foreclosure sale.[11] Petitioner had to bid more than 800% over the face amount of the note in purchasing the property to protect his interest.

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[9]The only payments on the property prior to foreclosure were certain interest payments. See District Court Finding of Facts No. 27; Dissenting Opinion, 715 F.2d at 953. As will be discussed *infra*, Petitioner paid the outstanding principal and interest by purchasing the note prior to foreclosure.

[10]In April 1972, twenty-one months after acquisition of the property, Respondent for the first time advised Petitioner that he refused to recognize any longer Petitioner's equitable ownership of the property. Dissenting Opinion, 715 F.2d at 953.

[11]*Id.* at 954.

The proceeds of the foreclosure and alleged profits misappropriated to Respondent by the Court of Appeals are the focus of this action.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Fifth Circuit is in conflict with applicable decisions of this Court as well as applicable decisions of the Supreme Court of Texas.

In respectfully appealing to the conscience of this Court to invoke the equitable remedies to which Petitioner is entitled, Petitioner's conviction to diligently litigate this matter has been fueled only by a determination to assert his equitable right to expect good faith and fair-dealing in business transactions, and by a determination to defend the time-honored Texas public policy that unfair dealing and unfaithful conduct should be redressed by broad and flexible equitable remedies.

Importantly, as discussed below, the Court of Appeals not only erred in misconstruing Texas law with respect to constructive trusts in violation of the *Erie* doctrine, but also departed from established judicial policy with respect to judicial review, and failed to recognize equitable principles previously enunciated by this Court.

As pertinent to the unchallenged facts in this case, this Court in *Robertson v. Chapman,*[12] specifically recognized the equitable standard that an agent acting in contravention of the duties owed to his principal "...becomes a *trustee* of the property improperly dealt with." (emphasis supplied) *Id.* at 681.

In fact, as related to Petitioner's equitable right to the proceeds generated by the foreclosure sale herein, Petitioner would note that the Court likewise held that the Respondent "...will be compelled to surrender it [the property], or, if he has disposed of it to a *bona fide* purchaser, to account not only for its real value, but for any profit realized by him on such resale." *Id.*

In recognizing that an agent must turn over to the principal the proceeds of the sale of property to which the principal is

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[12] 152 U.S. 673, 14 S. Ct. 741 (1893).

equitably entitled, the Court in *Robertson* reasoned as follows:

> He was precluded by the position voluntarily assumed by him from taking advantage of his principal, or from dealing with the property committed to his care in any other capacity than as an agent, who was bound to subordinate his own interests to those of his principal. He could not, directly or indirectly, become the purchaser and maintain any title thus acquired as against his principal, for, in so purchasing, his duty and his interest would come in conflict.
>
> ...
>
> The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal.

Id. at 681-682.

Accordingly, the Court of Appeals plainly erred in rewarding Respondent with the proceeds of the foreclosure sale. To allow Respondent to retain the proceeds is, very simply, to reward him for his breach of the fiduciary relationship existent with Petitioner.

Indeed, to allow Respondent to retain the proceeds in the instant case is even more egregious than the act referred to in *Robertson*, since the proceeds herein were paid in by Petitioner in an attempt to protect his equitable rights to the property.[13] *Sentry Title Co., Inc., supra,* Dissenting Opinion at 954. Under such circumstances it is clear that here, as in *Robertson*, equity requires that the proceeds from the sale be surrendered to Petitioner.

As previously stated, the Court of Appeals likewise violated the *Erie* doctrine. As the Court is aware, the decision in *Erie* made it clear that in the absence of a pertinent federal law, state law must govern in federal court, as mandated by the Rules of Decision Act, 28 U.S.C. §1652. (1976)

The rationale underlying *Erie* makes this proposition applicable

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[13] It is a well established maxim in equity, that one who is diligent in asserting his rights should be favored by courts sitting in equity matters. *Williams v. International Association of Machinists and Aerospace Workers*, 484 F.Supp. 917, 920 (S.D.Fla. 1979), cert. den. 449 U.S. 840.

to diversity and non-diversity suits, *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 200 (1956); Westen & Lehman, "Is There Life for *Erie* After the Death of Diversity?", 78 Mich. L. Rev. 311, 315-316 (1979), as well as to suits in equity. *Guaranty Trust Co. v. York*, 326 U.S. 99, 104 (1945). Were this not so, then a federal court would be able to "legislate" in substantive areas of state law under the guise of its decision-making authority. Such action by federal courts is clearly impermissible, there being no constitutional grant for such authority. *Hanna v. Plumer*, 380 U.S. 460, 471. (1965).

Disbursement of funds in an interpleader action is clearly governed by state law, the substantive issue being a determination of the rights of "rival claimants to a given fund." *Metropolitan Life Insurance Co. v. McCall*, 509 F.Supp. 439, 441 (W.D. Pa. 1981); *American Re-Insurance Co. v. Insurance Commission*, 527 F.Supp. 444, 450 (C.D. Calif. 1981). Thus, where substantive state law is the applicable law to be applied in federal court, this Court has recognized that it is the province of state courts to interpret and define the state law which federal courts are bound to apply. *Brady v. Maryland*, 373 U.S. 83, 90 (1963); *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944).

To adhere to these well-established judicial policies in the present case, serves to further the very concerns addressed in *Erie*. That is, it will promote a uniformity of decision whether the case is litigated in federal or state court. In addition, in the absence of a federal interest present to justify displacing applicable state law, there should be no impermissible encroachment by the federal judiciary into a clearly demarcated sphere of state judicial authority. *U.S. v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973); *Hanna v. Plumer*, 380 U.S. at 471; *Mason v. U.S.*, 260 U.S. 545, 558 (1923).

In the instant case, the Court of Appeals misapplied state law as defined by the highest courts in Texas.

In fact, the Court of Appeals misapplied Texas law in at least three different areas, any one of which would support a ruling in favor of Petitioner. In reversing the decision of the District Court the Court of Appeals misconstrued the Texas law of constructive trusts. Furthermore, the Court failed to realize that the

unchallenged facts in this matter support another form of constructive trust recognized in Texas law, a "technical fiduciary relationship", such as principal and agent. Finally, the unchallenged facts in this case clearly reflect the elements giving rise to a resulting trust.

The constructive trust doctrine is an equitable remedy which is not unique to Texas. As recognized by Justice Cardozo, "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."[14]

As emphasized by the Texas Supreme Court, "there is no unyielding formula to which a Court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted."[15]

Accordingly, the dissenting judge on the Court of Appeals panel correctly concluded that there are no set prerequisites for determining the recognition of a constructive trust.[16] Each case must therefore be carefully reviewed on its unique facts[17] to assure that complete justice is done.[18]

Finally, it is important to note that Texas law recognizes at least two independent forms of fiduciary relationships that can give rise to a constructive trust. The term fiduciary "includes those

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[14]*Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378, 380 (1919).

[15]*Meadows v. Bierschwale*, 516 S.W.2nd 125, 131 (Tex. 1974).

[16]*Sentry Title Co., Inc., supra* at 956. (Dissenting Opinion); See, *Gaines v. Hamman*, 358 S.W.2d 557, 560 (1962); *Omohundro v. Matthews*, 341 S.W.2d 401, 407-09 (1960); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 260-62 (1951).

[17]*Gaines v. Hamman, supra*, at 561.

[18]*Pierce v. Sheldon Petroleum Co.*, 589 S.W. 2d 849, 852 (Tex. Civ. App.-Amarillo 1979).

'*informal* relations' which exist whenever one party trusts and relies upon another, as well as *technical* fiduciary relations."[19]

Technical fiduciary relationships include such relationships as ". . . attorney-client or *principal-agent.*" [emphasis supplied].[20]

Where there is no technical fiduciary relationship existent regarding the transaction in question sufficient to give rise to recognition of a constructive trust, the Texas courts have looked to prior existing relationships to determine if there are sufficient factors warranting imposition of a constructive trust.[21]

An examination of the rationale of the Court of Appeals opinions in reversing the District Court plainly demonstrates that the Court misapplied Texas state law construing the imposition of constructive trusts.

At the outset, contrary to the well-established Texas law holding that the constructive trust remedy is a broad and flexible equitable remedy with no "unyielding formula" or "prerequisites" for its application, the Court of Appeals asserted two prerequisites for application of the equitable remedy. The Court of Appeals held that the first prerequisite is a "critical requirement" that there is a ". . . prior, unrelated history of close and trusted dealings of the same general nature or scope as the subject transactions."[22] The Court of Appeals held that the second prerequisite ". . . is a finding that unjust enrichment would result if the remedy of constructive trust were not imposed."[23]

To the contrary, there is not ". . . a single Texas decision that applies the two-prong test for constructive trust" which the Court of Appeals applied in this case.[24] As pertinent to the Court of

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[19] *Texas Bank & Trust Co., v. Moore*, 595 S.W. 2d 502, 507 (Tex. 1980).

[20] See, e.g. *Fitz-Gerald v. Hull, supra; Schiller v. Elick*, 240 S.W.2d 997 (Tex. 1951).; See also *Sentry Title Co., Inc.*, Dissenting Opinion, *supra* at 956).

[21] *Gaines v. Hamman, supra* at 561; *Thigpen v. Locke*, 363 S.W.2d 247, 253, (Tex. 1962); *Fitz-Gerald v. Hull, supra*, at 261.; See *Sentry Title Co., Inc.*, Dissenting Opinion, *supra* at 956 (citing *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333 (Tex. 1966).

[22] *Sentry Title Co., Inc., supra* at 946, 948.

[23] *Id.* at 948.

[24] *Id.* Dissenting Opinion at 956.

Appeals' "critical requirement" that there must be a *prior* fiduciary relationship we would note that Texas law expressly recognizes technical fiduciary relationships, such as the principal-agent relationship in the Dyckman transaction in issue.[25] Likewise, there are no Texas decisions citing unjust enrichment as an absolute prerequisite to the imposition of constructive trusts.[26]

Apart from the Court of Appeals error in asserting a two-prong test, the Court even misapplied Texas law in its interpretation of those Texas cases reviewing prior relationships in the absence of formal or technical fiduciary relationships concerning the transaction in issue.[27] For example, the Court of Appeals clearly erred by holding that a prior relationship "as a matter of law" must be a ". . . long-standing fiduciary or confidential, trusting relationship unrelated to the subject transaction."[28]

Even the Court of Appeals, in its second opinion dated March 12, 1984 is attempting to retreat from its erroneous ruling by stating that the Court did not place primary emphasis on this requirement. Importantly, however, the Court of Appeals, nevertheless, affirmed the prior decision as controlling in this matter.

As asserted by the Dissenting Judge, the Court's explanation in its second opinion is not convincing, as the original opinion plainly includes "long-standing" as a requirement for imposing constructive trusts where there are prior fiduciary relationships.[29] We would further point out that the Court's assertion in the second opinion stating that its summary of its ruling does not include the "long-standing requirement" is misleading, since the discussion of "prior history of unrelated dealings" begins immediately thereafter with the long-standing requirement.[30]

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[25] *Id.* at 956.

[26] *Id.* at 957.

[27] *Id.* at 956.

[28] See, *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 851 (Tex. 1980); *Edwards v. Strong*, 213 S.W.2d 979 (Tex. 1948)

[29] As noted by the Dissenting Judge, the headnotes published by West Federal Digest clearly reflect the "long-standing" requirement.

[30] *Sentry Title Co., Inc., supra* at 948.

Additionally, the Court of Appeals misapplied Texas law in reviewing whether there are sufficient prior fiduciary relationships to impose constructive trusts, when it interpreted Texas law as requiring that the prior relationships must have been "separate" from the subject transaction, yet "within the scope of the parties' prior dealings."[31] As discussed further below, such an interpretation is clearly illogical, since it includes mutually exclusive concepts. In fact, an attempt to apply such an interpretation would result in obliteration of the concept of recognizing informal constructive trusts when there have been sufficient prior dealings of the same scope and nature as the subject transaction.

The Court of Appeals in holding "unjust enrichment" as a prerequisite even misapplied Texas law on "unjust enrichment". In an unwarranted and improper inference completely unsupported in the record, the Court inferred that Petitioner had "unclean hands" precluding him from equitable relief. *Sentry Title Co., Inc., supra* at 950. While the record is totally devoid of any evidence regarding alleged unclean hands by Petitioner, the Court misapplied the Texas law of "unjust enrichment."

The cases decided in Texas clearly indicate that the conduct claimed to "soil the hands" of a plaintiff must affect the equitable relations between the parties to the litigation.[32] Importantly, the conduct of the party seeking equitable relief as to third parties is simply not to be considered in evaluating the "clean hands" of the plaintiff.[33] Under Texas law the clean hands doctrine is not to be applied to deny a plaintiff relief where the defendant has not been harmed by the conduct.[34]

As discussed below, there are no facts before this Court which would indicate that any conduct of Petitioner adversely affected Respondent. In fact, it is uncontested that Petitioner performed every promise made in favor of Respondent. Likewise, as discuss-

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[31] *Id.*, Second Dissenting Opinion at 12.

[32] *Office Employers' International Union v. Houston Lighting and Power Company*, 314 S.W.2d 315, 325 (Tex. Civ. App, 1958).

[33] *Hellyer v. Wig Imports, Inc. of the Southwest*, 458 S.W.2d 492, 495 (Tex. Civ. App, 1970).

[34] *Rodgers v. Tracy*, 242 S.W.2d 900, 905 (Tex. Civ. App. 1951).

ed further below, the record is totally devoid of any facts or challenges asserting that Petitioner had unclean hands. Finally, Petitioner's action which the Court considered to be "unclean" was merely Petitioner's anonymity in bidding on certain pieces of property other than the transaction in issue. Such action in no way affected Respondent, and as affirmed by the *amicus* parties herein, is a practice commonly accepted in honest business transactions.

The Court of Appeals has erred in claiming that the Dyckman transaction came within the scope of the Texas Trust Act[38] and that any equitable remedy was therefore defeated by the Statute of Frauds. To the contrary, as the Court of Appeals itself acknowledged in *Palmer v. Fuqua*, 641 F.2d 1146, 1159 (5th Cir. 1981), "[t]he imposition of a constructive trust is not prevented by the Statute of Frauds, the Statute of Conveyances, or the Texas Trust Act."

The Court of Appeals mistakenly characterized the transaction in issue as ". . . an oral trust to convey real property", thereby concluding that the transaction fell within the Texas Trust Act. *Sentry Title Co., Inc., supra* at 949. Importantly, however, the unchallenged facts specifically accepted by the Court of Appeals are clear evidence that the operative agreement between Petitioner and Respondent was an agreement to perform services in the acquisition of the property on behalf of Petitioner. *Id.* at 949. Thus, as opposed to constituting an oral trust to convey real property, the transaction in issue was merely a principal-agent relationship.

In misapplying the above areas of substantive state law with respect to constructive trusts, the Court of Appeals has caused substantial confusion and concern in an area involving extremely important Texas public policy. In fact, the real estate industry as well as the oil industry have filed *amicus*[39] briefs expressing grave concern that the effect of the Court of Appeals decision will narrow and frustrate a previously flexible equitable remedy

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[38]Tex. Rev. Civ. Stat. Ann., art. 7425b-7.

[39]Amicus briefs were filed by Greater Dallas Board of Realtors®, Inc. and Texas Independent Producers and Royalty Owners Association.

to the point that it is both unworkable and overly restrictive. Moreover, they have expressed serious concern that the current opinion converts the Texas constructive trust doctrine from a flexible remedy balancing many factors into one with defined and compartmentalized "elements." They concluded that such reasoning will in some instances lead to overapplication, and in other instances to underapplication of the doctrines, and will interfere with the public policy of Texas.

The substantial interest and concern asserted by the *amicus* parties plainly demonstrates the far-reaching implications of the Court of Appeals decision, and the likelihood of confusion and reoccurence of this issue of important Texas public policy.

Even aside from the Court of Appeals misapplication of Texas law governing prior "informal relationships" giving rise to constructive trusts, there are undisputed and accepted factual findings in the Court of Appeals decision, as well as the record, supporting a "technical fiduciary relationship." As previously stated, a "technical fiduciary relationship" can arise through transactions conducted in a principal-agent relationship.

Importantly, the unchallenged and specifically accepted factual findings of the District Court plainly support the elements prerequisite to finding a principal-agent relationship, thereby giving rise under Texas law to appropriate recognition of a constructive trust in the form of a technical fiduciary relationship.

Agency status arises from the parties' intention that the agent be "authorized to act for and on behalf of the principal" subject to the principal's control. *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.* 630 F.2d 250, 269 (5th Cir. 1980). Furthermore, intent may be inferred from the conduct of the parties to a transaction. *Texas Processed Plastics, Inc. v. Gray Enterprises,* 592 S.W.2d 412, 416 (Tex. Civ. App. 1979); *Irwin v. Irwin,* 300 S.W.2d 199, 203 (Tex. Civ. App. 1957).

As pertinent to the instant suit, the unchallenged and accepted findings substantiate that acquisition of the Dyckman property was made pursuant to an agreement between Petitioner and Respondent that Respondent would take and hold title to the property on behalf of Petitioner. *Sentry Title Co., Inc., supra* at 949. Moreover, the Court of Appeals recognized that the deter-

minative element of "control" establishing the agency status was satisfied when it acknowledged that Petitioner "was calling the shots" with respect to acquisition of the property. *Id.* at 949.

Accordingly, there can be no doubt that requisite elements sufficient to establish a principal-agent relationship exist in this case to support imposition of a constructive trust.

In addition to the above errors committed by the Court of Appeals in its decision regarding constructive trusts, the Court erred in failing to impose a *resulting trust*. The undisputed and unchallenged facts herein plainly demonstrate that the determinative elements giving rise to a resulting trust are present in the record.

Moreover, contrary to the Court of Appeals' assertion that "the issue of resulting trust is not raised by any party", *Sentry Title Co., Inc., supra* at 956, Petitioner clearly pled and proved the theory of resulting trust as an alternative ground of recovery. First Amended Answer and Claim of Defendant Travis Ward, at No. 23, Appendix D; Amended Proposed Findings of Fact and Conclusions of Law of Defendant Travis Ward at Conclusion of Law No. 3, Findings of Fact Nos. 7, 8, 9, Appendix C. Despite Petitioner's request that appropriate findings be made as to a resulting trust, the trial court found it unnecessary to address this issue, relying instead on the theory of constructive trust.

As pertinent to the fact that the District Court ruled in Petitioner's favor on the constructive trust claim as opposed to the resulting trust claims, the law is well-settled that where the decision rendered by the district court is correct, the Court of Appeals must affirm the decision even if the lower court relied on the wrong ground or gave a wrong reason. *S.E.C. v. Chenery Corporation*, 318 U.S. 80, 88 (1943); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Stegmaier v. Trammell*, 597 F.2d 1027, 1038 (5th Cir. 1979); *Standefer v. U.S.*, 511 F.2d 101, 104 (5th Cir. 1975).

"A resulting trust arises by operation of law when title is conveyed to one person but the purchase price or a portion thereof is paid by another." *Cohrs v. Scott*, 338 S.W.2d 127, 130 (Tex. 1960); *Olcott v. Bynum*, 84 U.S. 44, 59 (1873). The parties are presumed to intend that the equitable title follows the considera-

tion. *Bybee v. Bybee*, 644 S.W.2d 218, 221 (Tex. App. 1982); *Cohrs v. Scott, supra* at 130.

As pertinent to the transaction in issue herein, the Court of Appeals failed to recognize that the unchallenged findings of facts it specifically accepted likewise support the *prima facie* standards for resulting trust enunciated in its very own opinion. The Court set out the standards for imposition of a resulting trust as follows:

> A resulting trust is an actual, binding trust that can develop where the parties intended a confidential or fiduciary relationship to develop and acted accordingly, but failed to create a valid actual trust agreement. A resulting trust can occur, for example, where one party buys real property with the funds of another with the understanding that the property is being held for the party that provided the money.

Sentry Title Co., Inc., supra at 946.

In specifically accepting the factual findings necessary to support a resulting trust, the Court of Appeals later in its opinion found as follows:

> We accept, nonetheless, the finding of the district court that there was an oral contract under which Whatley would hold the title to the Dyckman tract on behalf of Ward ... Even adding the additional finding of the district court that there was a fiduciary relationship between the two, we conclude that the duty to transfer the property is still unenforceable...

Id. at 949.

Accordingly, for the reasons stated herein, the decision of the Fifth Circuit Court of Appeals is in conflict with applicable decisions of this Court as well as applicable decisions of the Supreme Court of Texas.

2. The Decision of the Fifth Circuit violates well-established judicial policy regarding appellate review and the Federal Rules of Civil Procedure.

A review of the Court of Appeals decision plainly indicates that the Court violated well-established judicial policy regarding appellate review and the Federal Rules of Civil Procedure, in

reversing the District Court's decision without challenging material facts as clearly erroneous, in inferring material facts which are not in the record, and in sifting through evidence in an illogical sequence without proper inferences leading to *prima facie* validity of its conclusions.

The Court of Appeals was bound by Rule 52(a) of the Federal Rules of Civil Procedure to apply the "clearly erroneous" standard and afford appropriate deference to the findings made below. Even though the court was not bound by the District Court's findings, the law is well-settled that findings should not be disturbed unless shown to be unsupported by substantial evidence in the record. *U. S. v. Gypsum Company*, 333 U.S. 364, 395, (1948). Application of Rule 52(a) essentially requires that to overrule the trier of facts who is "usually in a superior position to appraise and weigh the evidence" *Id.*, the Court of Appeals must be left with "the definite and firm conviction that a mistake has been committed." *Zenith Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)

As relevant to these proceedings, it is important to note that contrary to holding the findings determinative of the issues herein as "clearly erroneous", the Court of Appeals specifically accepted material facts which support a *prima facie* case for Petitioner. Moreover, the Court of Appeals left unchallenged, numerous other determinative factual findings. *Sentry Title Co., Inc., supra*, Dissenting Opinion.

As previously discused, the record below is replete with evidence supporting imposition of either a constructive or resulting trust on behalf of Petitioner. Having accepted these findings without challenge, reversal was outside the scope of Rule 52(a).

Furthermore, the Court of Appeals plainly departed from well-established judicial policy by inferring facts which the Court considered to be material to its decision.

As previously discussed, the Court misapplied Texas law by asserting a two-prong test for the imposition of constructive trusts, which included a prerequisite that Petitioner establish "unjust enrichment". While the unchallenged facts of this case clearly indicate that Respondent is being handsomely enriched for the

breach of his fiduciary relationship with Petitioner[37], the Court nevertheless concluded that Respondent had not been unjustly enriched.

Importantly, in the course of arriving at the above conclusion, the Court of Appeals inferred facts material to its conclusion which are not in the record and which have never been asserted by any party. While the record is totally devoid of any evidence regarding alleged "unclean hands" by Petitioner, the Court repeatedly makes such inferences in concluding that Petitioner is not equitably entitled to the proceeds herein.

The unsupported and unwarranted inferences of the Court of Appeals clearly demonstrate that the Court departed from accepted judicial policy for appellate review.

> The days are long since past when appellate courts in the federal system in equity cases reviewed findings of fact *de novo*. The scope of appellate review is more sharply limited even in causes that would have been formerly classed as proceedings in equity. The findings of the trial court must be clearly erroneous or they will not be set aside. *Chris-Craft Industries Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 393 (2nd Cir. 1973); See, *Zenith Corp. v. Hazeltine*, 395 U.S. at 123; *Wertz v. National City Bank of Evansville, Ind.*, 115 F.2d 65, 68 (7th Cir. 1940).

Finally, a review of the Court of Appeals decision in light of the numerous accepted and unchallenged determinative factual findings herein, as well as the numerous interpretations of Texas state law which do not apply logically compatible standards, clearly demonstrates an opinion incapable of supporting a *prima facie* valid conclusion.

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[37] *Sentry Title Co., Inc., supra* at 930.

CONCLUSION

In the interest of justice and in promoting good faith and fair dealing in business transactions, Petitioner Ward respectfully requests the equitable relief to which he is plainly entitled under Texas law as well as previous decisions of this Court.

For the reasons stated herein, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HIRAM C. EASTLAND, JR.
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600 E. Amite Street
Jackson, Mississippi 39202
(Counsel for Petitioner)

CERTIFICATE OF SERVICE

I, Hiram C. Eastland, Jr., one of the attorneys for Petitioner herein, am a member of the bar of the Supreme Court of the United States, hereby certify that on the 24th day of March, 1984, I served copies of Petitioner's foregoing Petition for a Writ of Certiorari on the several parties hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

1. J. Albert Kroemer, Esq.
   J. Michael Tibbals, Esq.
   Vetter, Bates, Tibbals, Lee & DeBusk
   2648 One Main Place
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   Attorneys for Respondent

2. Charles O. Shields, Esq.
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   Dallas, Texas 75225
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   Greater Dallas Board of Realtors, Inc.

3. David Crump, Professor of Law
   South Texas College of Law
   1303 San Jacinto Street
   Houston, Texas 77002
   Attorney for Amicus Curiae,
   Texas Independent Producers and
   Royalty Owners Association.

I further certify that all parties required to be served have been served.

Hiram C. Eastland, JR.

Hiram C. Eastland, Jr.

88-1581

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRAVIS WARD,
Petitioner

v.

SENTRY TITLE CO., INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

STAR GRAPHICS INC. - (601) 981-2161 - JACKSON, MS 39206

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APPENDIX A

Larry D. HARRIS, Plaintiff,

v.

SENTRY TITLE COMPANY, INC., et al., Defendants-Appellants,

v.

Travis WARD, Defendant-Appellee.

No. 82-1108.

United States Court of Appeals,
Fifth Circuit.

Sept. 26, 1983.

Rehearing and Rehearing En Banc
Denied Oct. 26, 1983.

The United States District Court for the Northern District of Texas, Robert M. Hill, J., imposed constructive trust on proceeds of real property sale and awarded majority of such proceeds to party who had provided funds for down payment for original purchase of such property, and record title holder and others appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that duration and intensity of parties' dealings were insufficient to justify imposition of constructive trust.

Reversed and rendered.

Will, District Judge, sitting by designation, dissented and filed opinion.

1. Trusts 91

"Constructive trust" is equitable remedy that can infer fiduciary-like relationship within transaction for purpose of promoting justice and that can be imposed on parties whose course of conduct over long, preexisting period suggests that relationship of confidence and trust was assumed by parties to subject action.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts 407

In interpleader action to determine proper distribution of pro-

ceeds from foreclosure sale of real property in Texas, moved from state to federal court, controlling law was that of Texas.

3. Frauds, Statute of 71

Under Texas law, contract to convey real property normally is subject to statute of frauds and requires writing in order to be enforceable. V.T.C.A., Bus. & C. § 26.-01.

4. Trusts 17(1)

Under Texas law, creation of most trusts requires written instrument to be effective. Vernon's Ann.Texas Civ.St. art. 7425b-1 et seq.

5. Trusts 91

Although under Texas law creation of most trusts requires written instrument to be effective, certain trusts can be imposed as equitable judicial remedy without formal writing; such are recognized as constructive trusts. Vernon's Ann.Texas Civ.St. art. 7425b-1 et seq.

6. Trusts 103(1)

Under Texas law, critical requirement for recognition of constructive trust would be that parties have confidential or fiduciary relationship prior to and apart from transaction in question.

7. Trusts 103(1)

Under Texas law, confidential or fiduciary relationship warranting recognition of constructive trust may be established through prior joint business ventures, family relationships or other types of close, confidence-inducing relationships; such relationship need not arise from strict, formal fiduciary relationship, but mere subjective confidence among business associates or the like is insufficient.

8. Trusts 1, 91

"Actual trust" is established by express will of parties, while "constructive trust" is equitable remedy based on court's interest in preventing unjust enrichment rather than on legally enforceable fiduciary relationships.

See publication Words and Phrases for other judicial constructions and definitions.

9. Trusts 91

"Constructive trust" is not fiduciary relationship, but rather equitable duty.

10. Trusts 104

Under Texas law, constructive trust arises when person holding title to property is subject to equitable duty to convey it to another on ground that he would be unjustly enriched if he were permitted to retain it; such is imposed without regard to, and even despite, intention of parties.

11. Trusts 65, 85

"Resulting trust" is actual, binding trust that can develop where parties intended confidential or fiduciary relationship to develop and acted accordingly, but failed to create valid actual trust agreement; resulting trust requires evidence of shared intent to establish strict fiduciary relationship.

See publication Words and Phrases for other judicial constructions and definitions.

12. Trusts 83

Resulting trust can occur where one party buys real property with funds of another with understanding that property is being held for party that provided money.

13. Trusts 62

Resulting-trust analysis did not apply to case where no shared intent to establish strict fiduciary relationship was claimed.

14. Trusts 92½

Doctrine of constructive trust cuts through requirements of statute of frauds or parol-evidence rule that otherwise could prevent recovery in a case.

15. Trusts 91

Under Texas law, there is no "unyielding formula" for determining whether constructive trust exists on facts of particular case.

16. Trusts 103(1)

As two general prerequisites to imposition of constructive trust, Texas case law requires prior, unrelated history of close and

trusted dealings of same general nature or scope as subject transactions and finding that unjust enrichment would result if remedy of constructive trust were not imposed.

17. Trusts 110

To show constructive trust under Texas law, plaintiff must first show, by preponderance of evidence, that parties had long-standing fiduciary or confidential, trusting relationship unrelated to subject transaction.

18. Trusts 103(1)

Under Texas law, whether or not fiduciary relationship exists is question of fact, but whether relationship is sufficiently long-standing to support imposition of constructive trust is question of law.

19. Trusts 103(1)

Under Texas law, dealings between parties were not sufficiently long-standing to support application of constructive trust where acquisition of tract at issue was part of overall scheme, of six months duration, to acquire adjoining property, dealings between parties were not prior, unrelated dealings in real property but rather were part of single master plan to acquire such adjoining property and parties had had no business dealings with each other prior to dealings in connection with such plan.

20. Trusts 103(1)

Under Texas law, six-month-old plan to acquire real property does not meet kind of ongoing, confidential relationship required to support imposition of constructive trust, no matter how intertwined parties' financial scheming might be during such period.

21. Trusts 17(3)

Without written trust agreement, arrangement to hold property on behalf of another would be unenforceable under Texas Trust Act. Vernon's Ann.Texas Civ.St. art. 7425b-1 et seq.

22. Frauds, Statute of 74(1)

Under Texas law, oral contract under which party would hold title to real property on behalf of another would be unenforceable under statute of frauds. V.T.C.A., Bus. & C. § 26.01.

23. Frauds, Statute of 55

Reason for statutes of frauds is to formalize dealings in land so as to avoid inexactness and possible abuses in proving oral land contracts.

24. Trusts 17(3)

Even if there were fiduciary relationship between party who purchased real property and other party who provided down payment for purchase, duty to transfer property was unenforceable under Texas Trust Act as oral trust to convey real property. Vernon's Ann.Texas Civ.St. art. 7425b-7.

25. Implied and Constructive Contracts 3

"Unjust enrichment" is equitable principle that recognizes situations where one party has received benefit at expense of innocent other person.

See publication Words and Phrases for other judicial constructions and definitions.

26. Implied and Constructive Contracts 3

Under Texas law, mere fact that one party has made profit is insufficient ground to order restitution on theory of unjust enrichment; profit must be "unjust" under principles of equity.

27. Implied and Constructive Contracts 3

In context of unjust enrichment, there is no requirement in the law that business judgment must be logical or successful, merely that there be business purpose behind decision.

28. Equity 65(1)

Ancient precept that he who comes into equity must come with clean hands is fundamental of equity jurisprudence.

29. Implied and Constructive Contracts 3

Profits, no matter how large, do not constitute unjust enrichment unless they equitably belong to another person.

30. Trusts 95

Under Texas law, retention of profits from sale of real property by party in whose name property was originally purchased would not result in unjust enrichment sufficient to establish con-

structive trust in favor of other party who provided money for down payment for such purchase.

31. Frauds, Statute of 125(1)

Verbal promises to convey real estate are unenforceable under Texas statute of frauds. V.T.C.A., Bus. & C. § 26.01.

Vetter, Bates, Tibbals, Lee & DeBusk, J. Albert Kroemer, J. Michael Tibbals, Dallas, Tex., for defendants-appellants.

Rohde, Chapman, Ford & How, Michael E. Rohde, Lawrence McDonald Wells, Dallas, Tex., for Ward.

Appeal from the United States District Court for the Northern District of Texas.

Before WILLIAMS and JOLLY, Circuit Judges, and WILL* District Judge.

JERRE S. WILLIAMS, Circuit Judge:

This appeal is an interpleader action to determine the proper distribution of proceeds from a foreclosure sale of real property in Henderson County, Texas. The case was moved from state to federal court when the IRS asserted a claim against the proceeds, 28 U.S.C. §§ 1340, 1345, and remained there after the IRS achieved satisfaction of its claims. The district court imposed a constructive trust on the proceeds in favor of defendant-appellee Travis Ward and awarded the majority of the funds to Ward, rather than to defendant-appellant Sentry Title Company or its controlling shareholder, Alan Whatley. We find that the facts do not support the imposition of a constructive trust under Texas law and reverse the district court.

I. *Facts*

Travis Ward is a successful business and oil man in Athens, Texas. In early 1970, Ward was interested in acquiring a 490 acre tract near Cedar Creek Lake in Henderson County, Texas. The owner of the property was the Tarrant County, Texas, Water Control Board. Fearing that the price would go up if he used his own name, Ward did not want to bid for the property personally. He therefore approached Alan Whatley, a local

*District Judge of the Northern District of Illinois, sitting by designation.

businessman who knew some members of the Water Board. Ward met in early 1970 with Whatley and Bill Hart, Whatley's attorney. Whatley and Hart agreed to help Ward submit a bid for the 490 acres. In return, Hart was to receive $30,000 to $35,000 if Ward acquired the 490 acres through these efforts. Whatley's compensation for acting on behalf of Ward was that he would receive Ward's aid in financing the purchase of a 16 acre tract in Athens, Texas. Whatley had a contract to purchase the Athens tract for approximately $80,000. Ward agreed to provide Whatley with $20,800 as a down payment on the property, which the parties agreed would be held jointly by Whatley and Ward.

Ward obtained the $20,800 through the State National Bank of Corsicana, Texas, in which Ward was the majority stockholder and a bank officer. The loan was made in Whatley's name, although Ward paid the note off out of his own funds. The district court found that this note was made in Whatley's name only because the lending officer objected to making a loan in the name of a bank officer.

On July 6, 1970, after several discussions of strategy, Hart made a bid to purchase the 490 acres from the Water Board for $480,000. The district court found this bid was made on behalf of Ward. Three other bids were made on that same date. A bid of $511,000 was submitted by Ward himself through one of his holding companies, Pan American Properties, Inc. Another bid of $771,750 was submitted by Home Engineering, Inc., a company controlled by Whatley. The district court found that this bid also was made on behalf of Ward. Finally, Spanish Shores, a company unrelated to the Ward endeavors, submitted a bid for $748,230. According to the facts as found by the district court, the Ward parties had hoped that one of their bids would be the high bid, and that any of their unnecessarily high bids could be withdrawn and still allow a Ward-related bid to win the 490 acres.

The Water Board made an initial determination that the Spanish Shores bid, although seemingly lower than the Home Engineering bid, was in fact the highest bid.[1] Ward took the two

[1] At first glance, $771,750 is larger than $748,230. However, the conditions of the bid, including the timing of payments could make a higher dollar bid inferior to a lower but less complicated offer. For example, $10,000 today is worth more than $10,500 a year from now, at current interest rates.

highest bids to an independent bank for analysis, in an attempt to show the Water Board that the $771,750 Home Engineering bid was in fact higher than the $748,230 bid. The Water Board planned to resolve the issue on July 28.

Between July 6 and 28, Ward met twice with Whatley and Hart. They decided upon additional steps that might help Ward to emerge the victor in the bid for the 490 acres. One plan involved the Dyckman tract, a property that abutted the 490 acres and possessed an easement over that land. Whatley and Hart had tried before to acquire this property. Ward advanced Hart $600 for expenses, and Hart entered into a contract to purchase the Dyckman property for $30,500. The Dyckman property was sold on about July 24 to Home Engineering, a company controlled by Whatley. The sales price was met with a $5,000 down payment that Ward apparently furnished himself, plus a promissory note for $25,500 given to the seller. The proceeds from a later sale of the Dyckman property are the subject of this appeal.

Another leg to the July strategic maneuvers was the acquisition of the Lacy lawsuit. Jack and Pauline Lacy had owned a piece of the 490 acre tract and sold it to the Water Board. Disputes later developed, and the Lacys were contemplating suit against the Water Board. Ward believed that if he held the right to pursue the Lacy suit, his chances of winning the 490 acres would be increased. Whatley acquired the rights to pursue the Lacy suit, with the assistance of Ward's attorney, Willis Moore.

When the Water Board met on July 29, 1970, it voted to reject all bids for the 490 acres and initiate new bidding with an October 15, 1971, date. This second round produced two bids, one by Sentry Title Company, Inc., a company controlled by Whatley, and the other by an unrelated company. These bids again were rejected by the Water Board, and a third round of bids took place in February of 1972. Ward did not bid in this final round because he felt the price of the 490 acres had gotten too high for him. Sentry Title, one of Whatley's companies, submitted a bid on behalf of Whatley, not on behalf of Ward, that won the property for $807,256.

Ward has not asserted any ownership interest in the 490 acres since he dropped out of the bidding. Nor has he pursued the other

related projects that grew out of the overall scheme to buy the 490 acres, such as the Lacy lawsuit or the Athens property that Ward helped Whatley to acquire. However, Ward has asserted an equitable interest in the Dyckman property that Whatley bought in July, 1970.

The status of the Dyckman tract had changed several times after Home Engineering bought it in July of 1970. First, title was transferred from Home Engineering to Sentry Title in 1972; Sentry was also controlled by Whatley at that time. Home apparently financed a second mortgage on the property to enable Sentry to buy it. The first mortgage on the property continued, but the holder of the lien, the original owner, sold the note to Bob John Robinson. When Whatley's companies fell into financial distress and defaulted on the note, Robinson called for a foreclosure sale. The property was sold at the foreclosure sale to Travis Ward for $250,000.[2]

Ward brought this interpleader action to assert a claim to the proceeds remaining from the Dyckman tract foreclosure sale.[3] Ward claimed, inter alia, that Whatley initially bought the property as Ward's agent, and that Ward therefore was entitled to any proceeds remaining for various creditors are paid. No claims were made against Whatley personally or against Whatley's other real estate holdings. The suit was filed initially in state court, but the IRS soon joined the action to assert a tax claim, and the case was removed to federal district court, 28 U.S.C. §§ 1340, 1345. When the IRS finally received satisfaction of its claims, the district court found it would be in the interest of justice to allow the case to remain in federal court rather than delay the litigation further by a remand to state court. We find no abuse of discretion in this ruling.

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[2]Ward's ultimate ownership of the Dyckman tract is unrelated to the case before us in which Ward lays claim to the proceeds of the foreclosure sale.

[3]Some claims, including certain trustee's expenses and claims of the IRS, either have been paid from this interpleader fund already or are stipulated to be superior to Ward's claim that we examine today.

The district court found that any oral partnership arrangement that might have existed among Ward, Whatley, and Hart would be unenforceable vis-a-vis the Dyckman tract under the Statute of Frauds. It similarly determined that Texas trust law would not recognize most fiduciary relationships asserted as existing between Ward and Whatley in the absence of a written agreement. However, the court did find that the facts of the case supported the imposition of a constructive trust on the transaction.

[1] A constructive trust is an equitable remedy that can be imposed on parties whose course of conduct over a long, preexisting period suggests that a relationship of confidence and trust was assumed by the parties to the subject action. The importance of a constructive trust in this case, of course, is the fact that such trusts, although involving real property, are not subject to the statute of frauds. The district court, after providing for the payoff of certain recorded liens, judgments, and attorneys fees, awarded the bulk of the $250,000 proceeds of the Dyckman tract to Ward by imposing a constructive trust upon the proceeds.

Whatley brings this timely appeal, asking us to overturn the imposition of a constructive trust.

II. *Constructive Trusts—Generally*

[2-5] The controlling law is that of Texas. Under Texas law, a contract to convey real property normally is subject to the statute of frauds and requires a writing in order to be enforceable. Tex.Bus. & Com. Code Ann. § 26.01 (Vernon 1968). Similarly, the creation of most trusts requires a written instrument to be effective. Texas Trust Act, Tex.Rev.Civ.Stat.Ann. art. 7425b-1 et seq. (Vernon 1960). Certain trusts, though, can be imposed as an equitable judicial remedy without a formal writing. These are recognized as constructive trusts.

A constructive trust is an equitable tool in a court's power that can infer a fiduciary-like relationship within a transaction for the purpose of promoting justice. *Gordy v. Alexander*, 550 S.W.2d 146 (Tex.Civ.App.—Amarillo 1977, writ ref'd n.r.e.). "Resort is had to it in order that a statute enacted for the purpose of preventing fraud [, the statute of frauds,] may not be used as an instrument for perpetrating or protecting a fraud." *Pope v. Garrett*, 147 Tex. 18, 23, 211 S.W.2d 559, 561 (1948).

[6, 7] In recognizing a constructive trust, the critical requirement for purposes of this case is that the parties have a confidential or fiduciary relationship prior to and apart from the transaction in question. *Rankin v. Naftalis*, 557 S.W.2d 940 (Tex. 1977); *Karnei v. Davis*, 409 S.W.2d 439 (Tex.Civ.App.—Corpus Christi 1966, no writ). This relationship may be established through prior joint business ventures, *e.g. Gaines v. Hamman*, 163 Tex. 618, 358 S.W.2d 557 (1962), family relationships, *Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985 (Tex.1948); *Ellisor v. Ellisor*, 630 S.W.2d 746 (Tex.App.—Houston [1st Dist.] 1982, no writ), or other types of close, confidence-inducing relationships. It need not arise from a strict, formal fiduciary relationship. *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex.1974); *Holland v. Lesesne*, 350 S.W.2d 859 (Tex.Civ.App.—San Antonio 1961, writ ref'd n.r.e.). However, mere subjective confidence among business associates or the like is insufficient to support a constructive trust. *Consolidated Gas & Equip. Co. v. Thompson*, 405 S.W.2d 333 (Tex.1966).

[8-10] The distinction between an actual trust and a constructive trust is critical. An actual trust is established by the express will of the parties, while a constructive trust is an equitable remedy based on the court's interest in preventing unjust enrichment rather than on any legally-enforceable fiduciary relationships. A constructive trust is actually not a fiduciary relationship at all but rather an equitable duty. As explained in the Restatement of Restitution § 160, adopted by the Supreme Court of Texas in *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256 (1951), a constructive trust arises when "a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." It is imposed without regard to, and even despite, the intentions of the parties.

[11-13] A constructive trust must also be distinguished from a resulting trust. A resulting trust is an actual, binding trust that can develop where the parties intended a confidential or fiduciary relationship to develop and acted accordingly, but failed to create a valid actual trust agreement. A resulting trust can occur, for example, where one party buys real property with the funds of

another with the understanding that the property is being held for the party that provided the money. The resulting trust analysis does not apply to this case, however, because it requires evidence of a shared intent to establish a strict fiduciary relationship. No shared intent to establish such a relationship is claimed in this case. The issue of resulting trust is not raised by any party.

[14, 15] The doctrine of constructive trust cuts through the requirements of the statute of frauds or the parol evidence rule that otherwise could prevent recovery in a case. *Palmer v. Fuqua*, 641 F.2d 1146, 1155 (5th Cir.1981). Yet, since this is an equitable remedy rather than a legal instrument there is no "unyielding formula" for determining whether a constructive trust exists on the facts of a particular case. *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex.1974). Prior Texas cases, however, serve as important guideposts in analyzing the principal factors.

In *Consolidated Gas & Equip. Co. v. Thompson*, 405 S.W.2d 333 (Tex.1966), the Supreme Court of Texas found that the dealings between the parties failed to establish a constructive trust but showed at most either an oral contract to convey real property or an oral trust, neither of which was enforceable under the Texas Statute of Frauds or the Texas Trust Act. The case involved attempts to secure drilling rights to certain Texas oil and gas properties. The Griffiths made an agreement that they would receive a $\frac{1}{16}$th overriding royalty from Consolidated Gas if they obtained the needed land. The Griffiths, finding that they could not secure the property in time, enlisted the aid of H.M. Thompson. They evidently promised Thompson $\frac{1}{3}$ of their $\frac{1}{16}$th interest. However, when Thompson obtained the rights directly for Consolidated Gas, Consolidated Gas refused to recognize any obligation to the Griffiths. The agreement between Consolidated Gas and the Griffiths was entirely oral. The Griffiths sued on a theory of constructive trust.

The Supreme Court of Texas held that no constructive trust was created under Texas law. There had been prior business dealings and the payment of finders fees between Consolidated Gas and the Griffiths. However, the court found the nature of these contracts to be sporatic. They did not meet a requirement of dealings "over a long period of time, [where] the parties had worked together for the joint acquisition and development of property

previous to the particular agreement sought to be enforced." 405 S.W.2d at 337. Stating that there was no prior fiduciary relationship between the parties, the court refused to invoke the remedy of a constructive trust. The court found that the Griffiths acquiesced in the oral nature of the agreement for the simple reason that they trusted the Consolidated Gas official. However, the court recognized "the fact that one businessman trusts another, and relies upon his promise to carry out a contract, does not create a constructive trust. To hold otherwise would render the Statute of Frauds meaningless." *Id.* at 336.

Again in *Rankin v. Naftalis,* 557 S.W.2d 940 (Tex.1977), the Supreme Court of Texas refused to impose a constructive trust on oil and gas lease transactions. The court noted that the parties had been involved in a joint venture. It also recognized that confidential relationships such as partnerships could impose a broader reach for a constructive trust than simple business dealings. However, the court found that the transactions in question were not based upon the joint venture between the parties. It refused to extend a fiduciary duty to cover the business dealings, saying: "[s]ubjective business trust, cordiality and the trust which prevails between businessmen which is the foundation of ordinary contract law" could not be a basis for imposing a trust that would thwart the statute of frauds. 557 S.W.2d at 944.

In *Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426 (Tex.Civ.App.—Houston [1st Dist.] 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), a pipeline contractor entered into an oral joint venture agreement with another contractor to bid on a major job. When the other contractor backed out of the joint venture, Panama-Williams brought suit seeking, inter alia, imposition of a constructive trust. The trial court gave summary judgment to the defendant, but the appellate court reversed and remanded for trial.

The appellate court recognized that a constructive trust requires "actual fraud or strict proof of a prior confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer." 576 S.W.2d at 432. The court was unwilling to find a prior fiduciary business relationship because the only business relationship was that of the joint venture made the subject of

the suit. Since the business dealings were no more long-lived than the contract in question, the court refused to find a constructive trust on that ground.

However, the court then considered the long-standing friendship between Panama Shiflett, one of the principals of Panama-Williams, and defendant Lipsey. The court found a long-standing personal relationship apart from the business dealings that influenced the scope of their business contacts. It held that the requisite fiduciary relationship could be satisfied on the basis of moral, social, domestic, or personal relationships. It did not, however, change the established Texas requirement that a claim of such a prior relationship demands strict proof in order to defeat the workings of the statute of frauds. *Id.* at 432-33.

[16] In sum, then, the Texas case law imposes two general prerequisites to the impositon of a constructive trust. The first is a prior, unrelated history of close and trusted dealings of the same general nature or scope as the subject transactions. The second is a finding that unjust enrichment would result if the remedy of constructive trust were not imposed. It is to these two inquiries that we now turn.

III. *Constructive Trust—Principles Applied*

A. Prior history of unrelated dealings.

[17-20] To show a constructive trust, a plaintiff must first show, by a preponderance of the evidence, *Putaturo v. Crook*, 653 F.2d 1027 (5th Cir.1981), that the parties had a long-standing fiduciary or confidential, trusting relationship unrelated to the subject transaction. *E.g.*, *Panama-Williams, Inc. v. Lipsey*, 576 S.W.2d 426, 432 (Tex.Civ.App.—Houston [1st Dist.] 1978), *aff'd after remand*, 611 S.W.2d 917 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Tyra v. Woodson*, 495 S.W.2d 211 (Tex.1973). Whether or not a fiduciary relationship exists is a question of fact, *Smith v. Bolin*, 153 Tex. 486, 271 S.W.2d 93, 97 (1954), but whether a relationship is sufficiently long-standing to support imposition of a constructive trust is a question of law. *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 263 (1951). We find as a matter of law that the dealings between Ward and Whatley in this case were not sufficiently longstanding to support the district court's application of a constructive trust.

First, it is clear from the undisputed evidence that the acquisition of the Dyckman tract was part of the overall scheme to acquire the 490 acres. It is of compelling significance in this case that the dealings between Ward and Whatley were not prior, unrelated dealings in real property. Rather, they were all part of a single master plan to acquire the 490 acres. Ward and Whatley had had no business dealings with each other prior to the arrangements to acquire the 490 acres. The findings of the district court confirm that the confidential relationship between Whatley and Ward first arose when Ward became interested in the 490 acres, and that "the agreement to buy the Dyckman property was clearly within the scope of that prior agreement and made in furtherance of the prior agreement." Under such a view, it was clearly erroneous for the district court to suggest that there was any confidential or fiduciary relationship between the two parties before the overall scheme developed. *See Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426, 432 (Tex.Civ.App.—Houston [1st Dist.] 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (contemporaneous business agreements cannot support imposition of a constructive trust). The evidence in this case cannot satisfy the requisite history of prior relationships. *See* Note, *Imposition of a Constructive Trust Based Upon a Breach of a Fiduciary Duty in Joint Venture Situations,* 21 S.Tex.L.J. 229, 232-36 (1981).

Even if the Dyckman tract transaction were independent and not part of the single, overall plan to acquire the 490 acres, it would still be erroneous to create a constructive trust. Ward and Whatley discussed business for the first time in early 1970, their first meeting over the 490 acres. Their plan to acquire the Dyckman tract began in July, 1970, less than six months later. Admittedly, there were several meetings, guarantees of loans, transfers of property, and cash payments flowing between the parties during the first months of 1970. However, no matter how intertwined the parties' financial scheming might have been during that period, a six month old plan to acquire properties does not meet the kind of ongoing, confidential relationship required under Texas law to support imposition of a constructive trust. *See Tyra v. Woodson,* 495 S.W.2d 211 (Tex.1973) (business relationships

from June to October insufficient to support imposition of constructive trust). *Cf. Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex.1974) (constructive trust may not require long-standing relationship where fraud is proven). Even if one were to count the additional time during which Whatley's companies held the tract, it would be difficult on the facts of this case to find a long-lasting, independent relationship between Ward and Whatley or his companies.

The district court found as a fact that Whatley acquired the Dyckman tract on behalf of Ward and with the understanding that it would be transferred to Ward. It is unclear if this finding actually is meant to cover the situation where the overall attempt to obtain the 490 acres failed. Ward, indeed, was calling the shots in mid-1970 as part of the general scheme to get the 490 acres. Ward also provided the down payment money with which Whatley bought the Dyckman tract. The district court recognized that many of the dealings between Ward and Whatley appeared to be interdependent. Most businessmen, for example, would not provide a $20,800 down payment on real estate to a virtual stranger, as Ward did for Whatley and the Athens property dealings, without some hope of personal gain.

[21-24] Whatley's own company name, however, was on the Dyckman tract deed and the mortgage. Whatley's firm, not Ward, made the mortgage payments and managed the Dyckman property, at least until the firm became insolvent.[4] We accept, nonetheless, the finding of the district court that there was an oral contract under which Whatley would hold the title to the Dyckman tract on behalf of Ward. Yet such an agreement is unenforceable under the statute of frauds for the very reason we have statutes of frauds: to formalize dealings in land so as to avoid the inexactness and possible abuses in proving oral land contracts.

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[4]It is not clear that Whatley was intending his management of the Dyckman tract to be at his own expense. On April 21, 1971, notably, Whatley sent Ward a bill for expenses in connection with their land transctions. It was not until April, 1972 that Whatley first mentioned to Ward that he considered himself, not Ward, the beneficial owner of the Dyckman tract. This conversation, in the words of the district court, led to a "physical altercation over the status of their relationship." Soon thereafter, on May 16, 1972, Ward sent Whatley

Even adding the additional finding of the district court that there was a fiduciary relationship between the two, we conclude that the duty to transfer the property is still unenforceable under the Texas Trust Act as an oral trust to convey real property. Tex.Rev.Civ.Stat.Ann. art. 7425b-7 (Vernon 1960). The business dealings between Ward and Whatley, whatever their nature, were not of sufficient duration or intensity to justify the imposition of a constructive trust. The first of the two requirements to establish a constructive trust was not met.

B. Unjust Enrichment.

The other requirement for imposition of a constructive trust is that the court's failure to intervene must cause unjust enrichment. We find this second element required to establish a constructive trust also is lacking.

[25, 26] Unjust enrichment is an equitable principle that recognizes situations where one party has received benefit at the expense of an innocent other person. The mere fact that one party has made a profit, though, is an insufficient ground to order restitution on a theory of unjust enrichment. The profit must be "unjust" under principles of equity. *See Pope v. Garrett*, 147 Tex. 18, 211 S.W.2d 559 (1948). *See generally* Restatement of Restitution § 1; 66 Am.Jur.2d Restitution and Implied Contracts § 3.

[27, 28] In the case before us, Ward was involved in covert discussions to acquire the 490 acres by rigging the bidding and without letting the Water Board know the true identity of the

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[4]*Cont'd.*

a check for the expenses listed on the April, 1971 bill. Whatley rejected Ward's check.

We do not know if the items listed on the April, 1971 bill were meant to cover all property management expenses related to the Dyckman property. Yet even if they were, this would represent nothing more than Whatley's belief at that time that he was holding the Dyckman property on behalf of Ward. Without a written trust agreement, such an arrangement would be unenforceable under the Texas Trust Act. The exception to this general rule known as "resulting trust" is not raised in this case, and this decision finds the "constructive trust" exception inapplicable.

bidder. The fact that the bidding for the 490 acres and the other tracts was made in the name of other persons was not due to any mistake, duress, or fraud. Ward was a sophisticated businessman who felt a compulsion to keep his name out of the dealings to the extent possible.[5] His decision to allow Whatley to purchase the Dyckman tract was not an oversight but an intentional business strategy. Ward may have subjectively trusted Whatley to transfer the property to him, but his failure to reduce that subjective trust to a written agreement was due to business strategy and not an equitable wrong. It is also questionable whether Ward's concealments and schemes in this deal generally leave him with the requisite "clean hands" for equitable relief.[6]

It is true that leaving the status quo undisturbed in this case will leave Whatley's company with the bulk of the $250,000 proceeds from the foreclosure sale of the Dyckman property. The tract was acquired for $30,500 during the attempt to purchase the 490 acres. Thus, it is clear that Whatley or his companies will realize a large profit from a small financial commitment. Ward points to this gain as evidence of unjust enrichment. He shows that he provided the $5,000 down payment on the property and was expecting to get title to the property in return. He

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[5]The bidding on the 490 acres was done on a blind basis. It is difficult to see how the appearance of Ward's name on the bids would influence a blind bidding scheme run by a public agency and open to the general public. However, the Water Board was not forced to accept any of the blind bids and in fact rejected the first two rounds of bidding. Ward might have held a valid belief that the presence of his name would influence the Water Board. There is, however, no requirement in the law that business judgment must be logical or sucessful, merely that there be a business purpose behind the decision.

[6]At the core of Ward's dealings with Whatley was Ward's desire to conceal his own identity from the Water Board. As part of this plan, he submitted multiple bids in different names for the same land. The district court found that his intent was to manipulate the bidding for the 490 acres and obtain the land at an advantageous price. Whether the total scheme would establish a legal offense, such as fraudulent concealment, is not before us today. However, even if the other requirements of a constructive trust were met on the facts before us, it is possible that Ward would still fail in his claims, under the ancient precept that he who comes into equity must come with clean hands, — a "fundamental of equity jurisprudence." 27 Am.Jur.2d Equity § 136, at 666-67.

feels that he, not Whatley, is entitled to the bulk of the almost ten-fold increase in the value of the Dyckman property.

[29, 30] The profit from the Dyckman property is certainly enrichment, but Ward misconstrues the meaning of the term unjust enrichment. Profits, no matter how large, do not constitute unjust enrichment unless they equitably belong to another person. *See* Restatement of Restitution § 1; 27 Am.Jur.2d Equity § 63; 66 Am.Jur.2d Restitution and Implied Contracts §§ 4-10. Ward might have provided the down payment for the Dyckman tract, but Whatley's companies made the mortgage payments and managed the property until struck by insolvency. This is not a case where one person used the funds of another for the sole purpose of acquiring property for that other person. Rather, Ward provided the down payment in the hope that the overall scheme to buy the 490 acres would bear fruit. The scheme, however, ended in abject failure. The necessary conclusion is that while there may be enrichment (profit), there has been no *unjust* enrichment in this case. This conclusion also compels the holding that the doctrine of constructive trust is inapplicable.

[31] In summary, Ward's claim for recognition of a constructive trust would fail even if he established one of the requirements but not the other. Ward, however, fails to establish either of the two requirements that would justify a constructive trust. Ward is left asserting his subjective confidence in his verbal dealings with Whatley. Verbal promises to convey real estate are unenforceable under the statute of frauds.

IV. *Conclusion*

We find that the district court erred in finding a pre-existing confidential relationship between Ward, Whatley, and Hart prior to and separate from the Dyckman tract transactions. In addition, the court erred in ruling that Whatley and his companies would be unjustly enriched at Ward's expense if allowed to recover the proceeds of the Dyckman tract foreclosure sale. We therefore hold that it was improper to impose a constructive trust between Ward and Whatley. We do not disturb the portions of the judgment awarding certain sums such as outstanding judgments and attorneys' fees to other parties originally involv-

ed in this litigation. Those portions of the judgment were not before us.[7] We reverse that part of the judgment awarding the remainder of the interpleader fund to Ward and render judgment for that amount to Sentry Title Co., Inc., record title holder of the Dyckman property at the time of the foreclosure sale.

REVERSED and RENDERED.

WILL, District Judge, dissenting:

The majority's opinion, which reverses the decision of the District Judge who heard the evidence in this case, has the unfortunate effect of rewarding, to the tune of more than $250,000,[1] appellant Alan D. Whatley (Whatley) who made little or no investment in the nine acre tract known as the Dyckman property but who asserts beneficial ownership of that property, in an admitted breach of his fiduciary obligation to appellee Travis Ward (Ward), and in what is known in the vernacular as a "double cross." Texas law, which is controlling here, does not require this, to me, inequitable and anomalous result.

The majority reaches its conclusion by straining the Texas precedents and, I believe, providing a new statement of Texas law, in contravention of what I understand to be the limited role of federal courts in applying state law. *See Erie Railroad Co.*

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[7]The rights of several claimants were settled before the district court entered its final judgment and order. These include those of the IRS and certain lien creditors. The final judgment of the district court ruled that two parties had first rights to recover from the fund. The first was J. Lawson Goggans, the attorney for Dyckman with respect to Dyckman's efforts to collect on the Dyckman tract mortgage. Goggans may recover attorneys' fees and costs of action from the interpleader fund. The second was Larry D. Harris, who acted as substitute trustee with respect to the foreclosure sale of the Dyckman tract. Harris may also recover attorneys' fees and costs of action from the interpleader fund. Whatley and Home Engineering should recover costs of action from Ward. All other parties shall bear their own costs. The remainder of the interpleader fund shall be awarded to Sentry Title Company, Inc., record title holder of the Dyckman property at the time of the foreclosure sale.

[1]At oral argument, counsel advised that the interpleaded fund here involved, as a result of interest earned thereon, now exceeds $250,000 although the exact amount was not specified.

v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). By reversing the decision of the District Court, which the majority opinion recognizes is not clearly erroneous, the majority also exceeds, I believe, the limitations normally respected and applied by appellate courts in reviewing trial court decisions. *See* Fed.R.Civ.P. 52(a); *Bryan v. Kershaw,* 366 F.2d 497, 499 (5th Cir.1966), *cert. denied,* 386 U.S. 959, 87 S.Ct. 1030, 18 L.Ed.2d 108 (1967); *Williamson v. Brown,* 646 F.2d 196, 200 (5th Cir.1981).

The District Court's findings of fact are not challenged in this appeal. In its effort to force this case into the mold of *Consolidated Gas & Equipment Co. v. Thompson,* 405 S.W.2d 333 (Tex.1966), the majority opinion overlooks some of those facts and glosses over others in footnotes. I, therefore, undertake my own recitation of the significant facts of the case. The following narration is taken from the District Court's uncontested findings as well as from other undisputed facts.

I. THE FACTS

This interpleader action arises out of a series of transactions commencing with two or three meetings in January, February or March of 1970 between Ward and Whatley to discuss possible prospective real estate purchases. Ward, a successful business and oil man in Athens, Texas, had long been interested in acquiring some real estate in the Cedar Creek Lake area of Henderson County, Texas, 490 acres of which were owned by the Tarrant County Water Control and Improvement District Number One (Water Board). Whatley was a successful land developer in the area around Henderson County. Since the 1960's, Ward had been acquainted with, and on occasion represented by, one William F. Hart (Hart), an attorney and former Henderson County Judge. Ward and Hart and Ward and Whatley had conversed in 1969 about a $50,000 loan from the State National Bank (State National), in Corsicana, Texas, of which Ward was Chairman of the Board. The loan, which fell through, was intended to be used by a 50-50 partnership of Hart and Whatley to purchase property along Cedar Creek Lake.

The next time Ward and Whatley met was in early 1970. One of the subjects discussed at that time was the 490 acre tract own-

ed by the Water Board. On January 30, 1970, Whatley made the first of a number of offers or bids to the Water Board for the 490 acre tract.

At some of the Ward-Whatley meetings, Hart, who was acting as Whatley's attorney, and Ward's attorney Willis Moore (Moore) were also present. They discussed, among other things, the possibility of Ward's acquiring the 490 acres and the acquisition by one or the other or jointly of other properties including 16 acres in downtown Athens, Texas known as the LaRue tract and 9 acres adjoining the 490 acre tract. The 9 acres were known as the Dyckman property and possesed an easement over the 490 acres owned by the Water Board.

As one result of these conversations, Home Engineering, Inc. (Home) owned by Whatley, received the proceeds of a loan in the amount of $20,800 from State National on Ward's oral assurances that he would pay the note himself and the bank would get its money back. That money was used by Whatley in the acquisition on April 2, 1970 of the LaRue property in Athens, the total purchase price of which was approximately $80,000. The loan was made in the name of Home and guaranteed by Ward, though all understood that Ward would pay it, since Ward was an officer and the principal stockholder of State National. Ward obtained a renewal of that loan on October 8, 1970 and ultimately did pay it off. The LaRue property was later conveyed without Ward's knowledge by Home to A.D.W. Enterprises (ADW), another Whatley-owned company, which later conveyed it to Computer Land Title, Inc. (Computer), another Whatley company. The deed of conveyance from Home to ADW was not recorded until some eight months after its purported date.

The District Court found that during the conversations in early 1970, Whatley and Hart agreed to help Ward submit a bid on the 490 acres in return for which Hart was to receive $30,000 to $35,000 if Ward obtained the tract and Whatley was to be compensated by Ward's paying off the $20,800 loan to Home, which he ultimately did. For various reasons, including Ward's fear that the price would go up if his interest was disclosed, it was proposed to make the bids on the 490 acres in other persons' names.

Accordingly, on July 6, 1970, a bid of $480,000 for the 490

acres was submitted to the Water Board by Hart for Ward as the undisclosed principal. Also on July 6, Ward submitted a bid of $511,000 in the name of one of his own companies, Pan American Properties, and Home submitted a bid of $771,750 also for Ward as the undisclosed principal. The plan was that, if Pan American Properties' bid was the second highest, Home would withdraw its bid. If no other bids were received, presumably both Home and Pan American would withdraw their bids. The plan failed when a fourth bid of $748,230 was also submitted on July 6 which the Water Board determined to be the most advantageous to it of the four bids submitted.

Between July 6 and July 28, 1970, Ward, Whatley and Hart had two meetings at which they discussed the possibility for tactical purposes of acquiring the Dyckman property with its easement over the 490 acre tract. Whatley and Hart had earlier entered into negotiations with Dyckman to purchase the 9 acres. About July 24, Home acquired the Dyckman property for $30,500 with a down payment of $5,000 provided by Ward and a promissory note executed by Home in the amount of $25,500 and secured only by a vendor's lien and deed of trust on the property. Ward also gave Hart $600 to pay for travel expenses in connection with the acquisition of the Dyckman property.

Hart flew to Canada to meet with Dyckman and took with him a cashier's check for the $5,000 arranged for by Ward. Whatley later contended that the $5,000 was a loan which he repaid on November 16, 1970 by conveying, at Ward's request, a lake lot he owned worth between $4750 and $6500 to Ward's friend, M.O. Atterbury. Ward denied that the $5,000 was a loan or that the transfer to Atterbury was its repayment. The District Court which heard the evidence found that Home through Hart had acquired the Dyckman property on behalf of Ward and that the conveyance to Atterbury was not in repayment of the $5,000.

At about the same time, June-July 1970, Ward, Whatley and Hart agreed that they would attempt, also for tactical purposes, to acquire a possible lawsuit against the Water Board with respect to 29 of the 490 acres which the Water Board had purchased from Jack and Pauline Lacy (the Lacys). The objective was to enhance their efforts to acquire the 490 acres for Ward. The theory of the lawsuit was that the Lacys were entitled to a reversion of ti-

tle to the 29 acres because of certain alleged misrepresentations made to them by the Water Board at the time of condemnation. Ward, Whatley and Hart agreed that the Lacys should be offered $10,000 payable when and if the suit was won plus any amounts they had to repay the Water Board for the reversion. Ward was to and did pay all expenses in connection with the suit.

In August 1970, Whatley acquired the right to file the suit in the Lacys' name and Moore, Ward's attorney filed it. Later, another attorney was retained and also paid by Ward to assist Moore in prosecuting the suit. In June 1971, Moore and Ward attempted unsuccessfully to negotiate a settlement of the suit as part of Ward's acquisition of the 490 acres.

At the July 29, 1970, meeting of the Water Board, all the July 6 bids for the 490 acres were rejected and new bids were set to be received some fifteen months later on October 15, 1971. On that date, two bids were submitted. One, by Whatley, with Sentry as the nominal bidder, was for $750,000. The second bid was for $801,150. Both were rejected and on February 10, 1972 yet another set of bids was taken by the Water Board and three bids were received. Sentry's bid of $807,256 was high and the property was sold to Sentry on May 25, 1972. Sentry both on October 15, 1971 and on February 10, 1972 was bidding for Whatley and not for Ward. Ward did not bid at either date on the 490 acres because he believed the price sought by the Water Board was too high.

In April 1972, twenty-one months after its acquisition by Hart for Ward in Home's name, Whatley for the first time advised Ward that he did not recognize that Ward had any interest in the Dyckman property which had been acquired on July 24, 1970, and later conveyed by Home to Sentry after the latter was organized. Prior to April 1972, Ward had not been aware that Home and Whatley were claiming any interest in the Dyckman property adverse to his. In fact, a year earlier on April 21, 1971, Whatley had sent Ward a bill for expenses he had incurred in connection with both the LaRue (Athens) and Dyckman properties, including the first interest payment on the $25,500 note, presumably on the premise that the expenses had been incurred for Ward's benefit as the beneficial owner. *See* District Court Findings of Fact # 27.

At Moore's instigation, Ward, Whatley, Moore and Hart met some time after Whatley, in April 1972, advised Ward that he did not recognize any interest of Ward in the Dyckman property. At that meeting, Ward and Whatley came to blows and no agreement was reached. On May 16, 1972, Ward sent Whatley a check for $18,672.50 to cover all past and future interest payments and other expenditures which Whatley would make on the Dyckman property. *See* Tr. 175-78. Whatley returned the check.

In August 1972, Ward filed suit in Henderson County against Whatley, Home, and Community Engineering, Inc. (Community), another Whatley company, asserting an equitable claim to the Dyckman property. Later he joined Sentry, to whom Home had conveyed the property, as a defendant. Sentry defaulted in that action, Ward nonsuited the other defendants and obtained a default judgment against Sentry which became final. He then immediately refiled against the other defendants. At the time Home conveyed the Dyckman property to Sentry, January 22, 1973, Ward's suit was on file and constituted notice to Sentry of his claim to an interest in the property.

Subsequently, in 1973, when Ward learned that Home had conveyed the Dyckman property to Sentry and that Dyckman was about to foreclose his vendor's lien and trust deed since payments on the note were in default, at Moore's suggestion, Ward agreed to purchase the $25,500 Dyckman note. Moore was concerned that a bona fide purchaser might defeat Ward's equitable claim to the property being asserted in the pending lawsuit. Ward and Moore arranged for one John Bob Robinson (Robinson) to attempt to acquire the note from Dyckman. Robinson did so and subsequently assigned the note to Ward. Ward's recollection was that he, through Robinson, paid Dyckman some $38,000 for the note which had a provision for increase in principal to reflect changes in the Consumer Price Index. *See* Sentry Exh. # 5.

At the foreclosure sale, Moore bid $250,000 for the Dyckman tract on behalf of Ward and obtained a Substitute Trustee's Deed to the property. It is the entitlement to the net proceeds of that transaction which is the subject matter of this lawsuit.

As indicated, this is an interpleader action brought originally

by Larry D. Harris (Harris), the trustee under the foreclosed Deed of Trust and the holder of the proceeds of the sale of the Dyckman property. Harris sought a determination of the owner of the net proceeds of the $250,000 from the foreclosure sale at which Moore on behalf of Ward bought the property. The proceeds were placed in the registry of the court. After allowing claims of the IRS for taxes and attorneys' and trustee's fees, the District Court entered Findings of Fact and Conclusions of Law awarding the net proceeds to Ward. It is from that award that Sentry, Home and Whatley appeal.

II. THE LAW

Several basic questions of Texas law are here involved. The Texas Statute of Frauds, Tex.Bus. & Com.Code Ann. sec. 26.01 (Vernon 1968), provides in relevant part that no action shall be brought in any court upon a contract for the sale of real estate or the lease thereof for a term longer than one year unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged. And the Texas Trust Act, Tex.Rev.Civ.Stat.Ann. art. 7425b-1, *et seq.* (Vernon 1960) provides in relevant part that no trust in relation to or consisting of real property shall be valid unless created, established or declared by a written instrument subscribed to by the trustor or by his agent duly authorized in writing. The Trust Act, however, specifically provides that it does not apply to a constructive or resulting trust.

The District Court determined that a constructive trust existed between Ward and Whatley as to the Dyckman property. It held that Ward had established by a preponderance of the evidence, as required by *Putaturo v. Crook*, 653 F.2d 1027, 1029 (5th Cir.1981), that a confidential or fiduciary relationship existed beteen him and Whatley prior to and apart from their Dyckman property dealings, *see Consolidated Gas & Equipment Co. v. Thompson, supra*, 405 S.W.2d at 337, and that the agreement sued upon was within the scope of their prior dealings, as required by *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex.1977). The Court also found that it would be inequitable to permit Whatley to retain the proceeds from the sale of the Dyckman property and that, even absent a written agreement, a confiden-

tial or fiduciary relationship could arise from a purely personal or informal relationship where trust and confidence had been reposed by the parties by reason of that relationship. The Court did not discuss whether the facts here gave rise to a resulting trust, presumably because it was satisfied that they did establish a constructive trust.

The trial court found that the fiduciary relationship existed between the parties here, prior to and apart from any agreement with respect to the Dyckman property, when Whatley and Hart agreed in early 1970 to assist Ward in acquiring the 490 acres for which assistance Ward was to pay Hart $30,000-$35,000 and to pay the $20,800 loan of Home at State National which Whatley had used to acquire the LaRue (Athens) property. The trial court held further that the relationship extended to all the other ventures, such as the Lacys' lawsuit and the placing of bids with the Water Board, in which the parties joined and which were related to their efforts under the agreement to assist Ward in acquiring the 490 acres, and that to allow Whatley and Sentry any interest in the proceeds of the sale of the Dyckman property would unjustly enrich them.

Accordingly, the District Court found that Home and Whatley, as its owner, had acted in a fiduciary capacity in the acquisition of the Dyckman tract (the successful negotiations were actually conducted by Hart), and that therefore Home and subsequently Sentry held title to the property in constructive trust for Ward. Whatley's refusal in April 1972 to have Home transfer title to Ward was, accordingly, a breach of that fiduciary relationship and the constructive trust.[2]

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[2]The majority suggests that it is unclear if the District Court finding that Whatley was obligated to transfer the Dyckman property to Ward was meant to cover the situation where the efforts to obtain the 490 acres for Ward failed. The District Judge made his finding more than ten years after Ward abandoned his interest in the 490 acres. Based in part on that finding, he found that Whatley had breached his fiduciary duty to Ward in asserting a beneficial interest in the Dyckman property and refusing to convey it to Ward. I find no ambiguity in the trial judge's finding. Whatley acquired the Dyckman tract with Ward's money for his benefit and with the understanding that he was holding it for Ward regardless of what happened to the 490 acres. If Ward acquired the 490 acres or not, Whatley had no equitable right to the Dyckman property and until April of 1972 he claimed none.

Since it is undisputed that none of the understandings between the parties were in writing, the only question to be resolved is whether the trial court properly found that, under all the facts, a constructive trust was created or, alternatively, a resulting trust was created, or whether all that existed was an oral contract to convey real estate which is unenforceable under the Statute of Frauds or an oral trust with respect to real estate which is unenforceable under the Texas Trust Act.

As the majority recognizes, the Texas Supreme Court has recently emphasized that there is no "unyielding formula" for determining whether a constructive trust should be decreed and that the facts of each individual case must determine the appropriate relief. *Meadows v. Bierschwale,* 516 S.W.2d 125, 131 (Tex.1974). That a court of equity should respond flexibly to the facts before it, applying broad, general principles of fairness, is no recent innovation in the long development of the Texas law of constructive trusts. *See also, e.g., MacDonald v. Follett,* 142 Tex. 616, 180 S.W.2d 334, 337 (1944) ("[n]o rules can be prescribed and no attempt should be made to formulate rules for the measurement of conduct by courts of equity"); *Pope v. Garrett,* 147 Tex. 18, 211 S.W.2d 559 (1948); *Fitz-Gerald v. Hull,* 150 Tex. 39, 237 S.W.2d 256, 260-62 (1951); *Gaines v. Hamman,* 163 Tex. 618, 358 S.W.2d 557, 560 (1962) (quoting *MacDonald v. Follett, supra); Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426, 432 (Tex.Civ.App. 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.1981). *And see also Gertner v. Hospital Affiliates International, Inc.,* 602 F.2d 685, 687 (5th Cir.1979). And consistent with this view of the broad, flexible posture of equity in imposing the constructive trust remedy, the Texas Supreme Court in *Fitz-Gerald v. Hull, supra,* long ago adopted the definition of constructive trust contained in the Restatement of Restitution sec. 160, as follows:

> Where a person holding title to property is subject to an equitable duty to convey it to another *on the ground that he would be unjustly enriched if he were permitted to retain it,* a constructive trust arises. [Emphasis added.]

Moreover, it is also a firmly established principle of the Texas law of constructive trusts, which neither the majority nor the appellants dispute, that the "fiduciary" or "confidential" relation-

ship necessary to give rise to "an equitable duty to convey" is a correspondingly flexible concept not subject to or governed by any set of technical prerequisites such as those necessary for a finding of partnership or joint venture. *See, e.g., Gaines v. Hamman, supra,* 358 S.W.2d at 560-61; *Cartwright v. Minton,* 318 S.W.2d 449, 453 (Tex.Civ.App.1958); *Omohundro v. Matthews,* 161 Tex. 367, 341 S.W.2d 401, 407-09 [1960]; *Smith v. Bolin,* 153 Tex. 486, 271 S.W.2d 93, 97 (1954); *Fitz-Gerald v. Hull, supra,* 237 S.W.2d at 261.

Although there may be a question of fact, *Smith v. Bolin, supra,* 271 S.W.2d at 97, whether the circumstances of a particular case warrant the finding that justifiable trust and confidence were reposed in the one against whom a constructive trust is sought to be decreed, *see Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex.1962), I find nothing in the Texas cases to limit or qualify the Texas Court of Appeals' observation in *Cartwright v. Minton, supra,* that

> "The term 'fiduciary' is derived from the civil law. It is impossible to give a definition to the term that is comprehensive enough to cover all cases. Generally, speaking, it applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith rather than legal obligation,... The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations."

318 S.W. at 453. It bears emphasis that there is no challenge to the District Court's factual finding, which is accepted by the majority, that there was a fiduciary relationship between Ward and Whatley antedating their decision to acquire the Dyckman property.

Despite the foregoing, and without citation to any supporting Texas authority, the majority concludes that Texas case law imposes two absolute prerequisites to the imposition of a constructive trust: (1) a long-standing fiduciary or confidential trusting relationship unrelated to the subject transaction *and* (2) that unjust enrichment would result if a constructive trust was not imposed. Majority Opinion at 13.

With all due respect, the majority's restatement of the Texas law in such absolute terms is not reflected in any Texas decision and has the unfortunate defect of obscuring the one certain principle of the Texas law of constructive trusts, which is repeatedly emphasized in the decisions cited above, that the cases are to be dealt with on their individual facts, applying principles of equity and fairness.

I have searched in vain for a single Texas decision that applies the two-prong test for constructive trust that the majority announces today. It is certainly true that, since the decision in *Consolidated Gas and Equipment Co. v. Thompson, supra,* many Texas courts have concluded that, absent a so-called "formal" fiduciary relationship, like that between attorney and client, a finding of constructive trust depends on the existence of a confidential or fiduciary relationship separate and apart from the transaction in issue. *See, e.g., Panama-Williams, Inc. v. Lipsey, supra,* 576 S.W.2d at 433. Accordingly, some cases deny the constructive trust remedy either on the basis of a finding that there was no relationship between the parties prior to the subject transaction, *see Tyra v. Woodson,* 495 S.W.2d 211 (Tex.1973); *Karnei v. Davis,* 409 S.W.2d 439 (Tex.Civ.App.1966); *Hawkins v. Haffa,* 469 S.W.2d 733, 739—40 (Tex.Civ.App.1971); *Linder v. Citizens State Bank of Malakoff, Texas,* 528 S.W.2d 90, 94 (Tex.Civ.App.1975); *Thomson v. Norton,* 604 S.W.2d 473, 476 (Tex.Civ.App.1980), or on the basis that, while the parties did have a prior relationship, it was not fiduciary or confidential in character, *see Gasperson v. Christie, Mitchell & Mitchell, Co.,* 418 S.W.2d 345, 356 (Tex.Civ.App.1967); *Patton v. Callaway,* 522 S.W.2d 252 (Tex.Civ.App.1975); *Marut v. Collier,* 583 S.W.2d 682, 684—85 (Tex.Civ.App.1979).

However, I do not find an absolute requirement in any of these cases that the prior relationship have been of many years' or "long" standing. And since the unchallenged finding of the District Court here is that there was a fiduciary relationship between Ward and Whatley prior to and independent of their decision to have Whatley take record title to the Dyckman property, none of these cases supports the majority's result.

Further, there is express authority in the Texas cases that the two prongs isolated by the majority are not the sole factors

governing the imposition of a constructive trust. The majority's rule does not, for example, adequately deal with *Meadows v. Bierschwale, supra,* decided by the Texas Supreme Court in 1974, which holds that the constructive trust remedy may be applied in a suit for rescission of a land conveyance even in the absence of any prior relationship between the parties where there is evidence and a finding of actual fraud in the transaction. 516 S.W.2d at 128-29. *See also Maykus v. First City Realty and Financial Corp.,* 518 S.W.2d 887, 896 (Tex.Civ.App.1974) (letter of intent provides documentary proof of the confidential relationship of a present joint venture and, for purposes of constructive trust remedy, is "equivalent" to proof of a preexisting, separate confidential relationship).

Finally, the majority's two-pronged rule implicitly assumes that certain of the older Texas Supreme Court cases, in which the constructive trust remedy was imposed without a finding of any "long-standing fiduciary or confidential, trusting relationship unrelated to the subject transaction," *see, e.g., MacDonald v. Follett, supra; Edwards v. Strong,* 147 Tex. 155, 213 S.W.2d 979 (1948); *Fitz-Gerald v. Hull, supra,* are of no continuing validity after *Consolidated Gas & Equipment Co. v. Thompson, supra.* There is no explicit Texas authority of which I am aware to support this assumption and, indeed, there is post-*Consolidated Gas* authority affirming the continued validity of the leading cases. *See, e.g., Tuck v. Miller,* 483 S.W.2d 898, 905—06 (Tex.Civ.App.1972).

The *Consolidated Gas* decision itself, the decision upon which the majority and the appellees primarily rely, contains no reference whatsoever to "unjust enrichment," the second prong of the majority's two part test[3]. Moreover, *Consolidated Gas* does not signal a radical narrowing of the availability of the constructive trust remedy in Texas. Since that decision, the Supreme Court

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[3]It is perhaps ironic, in light of the frequent statement in the Texas cases that prevention of unjust enrichment is the purpose of the constructive trust remedy, *see, e.g., Fitz-Gerald v. Hull, supra,* 237 S.W.2d at 261, that there is even an indication in at least one Texas case that prevention of unjust enrichment may, in fact, not be a prerequisite to the remedy. *See Holland v. Lesesne,* 350 S.W.2d 859, 862-63 (Tex.Civ.App.1961).

of Texas, *Meadows v. Bierschwale, supra,* 516 S.W.2d at 131, and this court, *Gertner v. Hospital Affiliates International, Inc.*, 602 F.2d at 687, have expressly reaffirmed that whether the constructive trust remedy is to be imposed depends on the particular facts before the court.

In *Consolidated Gas,* the Texas Supreme Court found that "the proof in this case," 405 S.W.2d at 337, failed to establish a constructive trust but showed at most either an oral contract to convey an interest in realty or an oral trust, neither of which was enforceable under the Texas Statute of Frauds or the Texas Trust Act. The facts in the case were that C.A. and D.A. Griffith (father and son—the Griffiths) orally agreed with L.B. Newman (Newman), president of Consolidated Gas & Equipment Company of America (Consolidated) to assist him in securing oil and gas leases on properties, particularly those located adjacent to producing properties.

When Newman indicated he wanted a lease on a particular property, D.A. Griffith (D.A.) found that he could not get it fast enough and enlisted the assistance of Thompson, who then worked for Consolidated. D.A. agreed to give Thompson a one-third interest in the Griffith's one-sixteenth royalty if he could obtain the lease. That agreement (between the Griffiths and Thompson) was reflected in a written document which included a reference to a "promissory agreement" on the part of Newman to give the Griffiths and Thompson a one-sixteenth override under the lease. Thompson secured the lease in the name of Consolidated.

The Texas Supreme Court found that the Statute of Frauds and the Texas Trust Act made the alleged oral agreement between the Griffiths and Newman unenforceable. In so holding, it opined, 405 S.W.2d at 336,

> The fact that people have had prior dealings with each other and that one party subjectively trusts the other does not establish a confidential relationship.

It went on to say, "...the fact that one businessman trusts another, and relies upon his promise to carry out a contract does not create a constructive trust." Rather, "...there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit." Finally, it offered the general observation

that a fiduciary relationship between businessmen who were not joint venturers could arise "where, over a long period of time, the parties had worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced." Since it found no such relationship, the Court held that no constructive trust had been established in the particular case.

The factual and equitable differences between *Consolidated Gas* and the instant case are obvious. In the former, the Griffiths invested no money in acquiring the leases. Here, Ward furnished all the money to acquire the Dyckman property. The alleged agreement between the Griffiths and Newman related to a single lease. The dealings between Ward and Whatley related to a number of transactions, including the 490 acres owned by the Water Board, the LaRue (Athens) property, the Dyckman property and the Lacys' reversionary claim lawsuit.

With respect to each of these, Ward furnished all the cash until such time as he abandoned his interest in acquiring the 490 acres. He paid the $20,800 note, the proceeds of which Whatley used to acquire the LaRue (Athens) property. He paid the $5,000 down payment plus some $600 in Hart's travel expenses to acquire the Dyckman tract and ultimately purchased the $25,500 note which Home gave Dyckman for the balance of the purchase price. He paid all expenses in connection with the Lacys' lawsuit.

In Consolidated Gas, one of the parties Newman, was dead and the only testimony as to the oral understanding came from those seeking to establish the constructive trust. In *Consolidated Gas,* the Griffiths and Thompson sought some $16,000 in royalties under the one-sixteenth overriding royalty, a royalty based on Thompson's securing a lease at a time when he was employed by Consolidated, probably a breach of his duty to his employer. Here, Whatley seeks $250,000 for which he made no investment and for an interest to which he did not claim any entitlement until April 1972, almost two years after the acquisition of the property and one year after he had billed Ward seeking reimbursement of the money he had spent in the Dyckman transaction, an obvious acknowledgment that Ward was the beneficial owner of the property. In *Consolidated Gas,* the Court found evidence only

of a unilateral subjective trust on the part of the Griffiths, no mutual or reciprocal trust on the part of Newman.

Even assuming, which it does not, that *Consolidated Gas* imposes an absolute and inflexible requirement of a "prior and separate fiduciary relationship" and states, as an unyielding rule, that isolated business transactions fall outside the scope of the constructive trust doctrine, *see Tyra v. Woodson*, 495 S.W.2d 211 (Tex.1973), it does not follow, on this record, that Whatley should or must be awarded this undeserved windfall for his breach of trust. But neither *Consolidated Gas* nor any other Texas authority that I have found requires or even directly supports the majority's holding that "[t]he business dealings between Ward & Whatley ... were not of sufficient duration or intensity to justify the imposition of a constructive trust." Majority Opinion at 949. Indeed, review of the cases cited above—consistent with the flexible principles of equity—yields no such absolute rule and very little discussion of what "duration" in months or years or level of "intensity" of prior dealings is necessary to sustain a constructive trust.

Here, while the relationship between Ward and Whatley was not one of many years' standing, it did involve a number of distinct transactions in each of which there apparently was mutual trust and confidence. Whatley trusted Ward to pay the $20,800 Home loan from State National used by Whatley to purchase the LaRue (Athens) property and Ward paid it. Ward trusted Whatley to negotiate and obtain an assignment of the Lacys' possible claim against the Water Board which Whatley did on the understanding that Ward would pay all expenses in connection with the suit, which he did. Until such time as Ward lost interest in the 490 acre tract, Whatley submitted bids admittedly on Ward's behalf. Hart, on behalf of Ward, negotiated the acquisition of the Dyckman tract with funds provided by Ward who also paid his expenses although title was vested in Home, a Whatley company, which also executed the note and trust deed for the balance of the purchase price, a note ultimately paid by Ward.

Exactly how long the relationship between Whatley and Ward existed is not entirely clear. The original conversations took place in January, February or March of 1970. The LaRue (Athens) pro-

perty was acquired on April 2, 1970 with the proceeds of the $20,800 loan. It was a six-months note and Ward had it renewed on October 1, 1970. The record does not indicate when he paid it off but it apparently was some time in 1971. As a result of meetings in July 1970, the Dyckman property was acquired on July 24 and the assignment of the Lacys' rights to sue the Water Board in August of 1970. Bids on behalf of Ward were made by Whatley as late as July 6, 1970 and Ward and Moore attempted unsuccessfully in June of 1971 to negotiate a settlement of the Lacys' lawsuit as part of Ward's acquisition of the 490 acres. On April 21, 1971, Whatley sent Ward his bill for expenses he had incurred in connection with both the LaRue and Dyckman properties. Not until April 1972, a year later, did Whatley inform Ward that he was denying that Ward had any interest in the Dyckman property.

Depending on what facts are deemed determinative of the termination of the relationship, it would appear that it lasted at least some eighteen months until mid-1971, since Whatley was billing Ward for expenses in April of that year, Ward was still endeavoring to secure the 490 acres in June of that year and Whatley did not submit a bid for the 490 acres on his own behalf until October 1971. If one takes the date on which Whatley first told Ward he did not recognize any interest of the latter in the Dyckman property as the termination date, the relationship existed until April 1972, more than two years after its inception in early 1970.

Whatley has not challenged the District Court's Findings of Fact and there is substantial evidence to support them. They are certainly not clearly erroneous. Accordingly, we are bound to accept them. *See Bryan v. Kershaw, supra,* 366 F.2d at 499; *Williamson v. Brown, supra,* 646 F.2d at 200.

Based on those findings and applying Texas constructive trust law which involves a case-by-case analysis of all the facts and circumstances of the relationship between the parties, the trial judge found that a fiduciary relationship existed between Whatley and Ward and that a constructive trust existed with respect to the Dyckman property of which trust Ward was the beneficiary. Unless we conclude that Texas law absolutely requires a longer and more comprehensive relationship than the relationship in-

dicated by the numerous activities in which Ward and Whatley engaged over a period of eighteen to twenty-seven months, the District Court's conclusions of law are clearly correct under Texas trust law. Whatley and Ward certainly reposed mutual confidence and trust in each other with respect to a number of interrelated but distinct transactions, which confidence and trust, it should be noted, were respected and not violated in any instance by all involved except Whatley. I find nothing in the Texas cases which would compel the conclusion that Judge Hill erroneously found a constructive trust. *Cf. e.g., Sanchez v. Matthews,* 636 S.W.2d 455, 458-59 (Tex.Civ.App.1980).

Judge Hill also found that Whatley and his company, Sentry, would be unjustly enriched if they were permitted to retain the proceeds from the sale of the Dyckman property and that it would be inequitable for them to do so. Given all the facts, this is an obviously correct conclusion. With little or no investment, they would receive over $250,000. In *Fitz-Gerald, supra,* one of the leading Texas cases on constructive trusts, the Texas Supreme Court adopted the Restatement definition that a constructive trust arises when "a person holding title to property ... would be unjustly enriched if he were permitted to retain it,..." *see also Panama-Williams, Inc. v. Lipsey, supra,* 576 S.W.2d at 433.

The majority, however, inexplicably concludes that Whatley will not be unjustly enriched because Ward did not have "clean hands" in his dealings with the Water Board. Whether or not that is true, it is irrelevant. As previously pointed out, Ward faithfully carried out every commitment he made to Whatley. He paid off the $20,800 loan from State National, the proceeds of which Home used to purchase the LaRue (Athens) property. He paid all costs and expenses with respect to the Lacys' claim. He paid the purchase price for the Dyckman property, the $5,000 down payment and later purchased the $25,500 note. He even paid Hart $600 in expenses to go to Canada to negotiate the purchase of the Dyckman property.

Thus, whatever the cleanliness of Ward's hands with respect to the Water Board, it is perfectly clear that, with respect to Whatley, they were "clean." And it has long been understood both elsewhere, *see, e.g., Republic Molding Corp. v. B.W. Photo Utilities,* 319 F.2d 347,349 (9th Cir.1963), and in Texas, *see*

Omohundro v. Matthews, supra, 341 S.W.2d at 410, that the clean hands defense is only available where the plaintiff's hands have become dirtied vis-a-vis the one against whom he asserts his equitable claim. The only party with "dirty hands" here is Whatley. As the trial judge found, and the majority does not dispute, he breached his fiduciary duty to Ward. The majority is applying the "clean hands" doctrine to the wrong party.

The majority also suggests that, while they recognize Whatley clearly will be greatly enriched, he will not be unjustly enriched since Whatley's companies made the mortgage payments and managed the Dyckman property until struck by insolvency. This is ironical to say the least. Whatley billed Ward in 1971 for his expenditures on both the Dyckman and LaRue (Athens) properties and then, after changing his position and asserting beneficial ownership of the Dyckman property in 1972, refused to accept payment. It seems obvious that at the time he made the expenditures, he did so on the assumption he was making them for Ward's benefit and would be reimbursed. Any amount he is now out-of-pocket is the result of his rejection of Ward's check.

The total bill for both properties was $18,672.50. The record indicates that no more than $4,892.50 could have related to the Dyckman property surveying and interest expenses. Two hundred fifty thousand dollars is certainly unjust enrichment to a man who invested little or nothing, claimed reimbursement for what little he may have invested and then breached his fiduciary duty by belatedly claiming a beneficial interest in the property and double-crossing the man who provided all the funds in their dealings.

As an overall matter, Whatley has already received $20,800, the proceeds of the State National loan which Ward paid. The majority proposes to award him an additional sum, of more than $250,000, for a total of more than $270,000. For admittedly faithless conduct, this is rich reward.

To reverse the trial judge to achieve such a result is to me totally inexplicable. Rather than straining to find Texas law, or worse, to enunciate new Texas law, to reverse a just and equitable decision, I would assume an appellate court would seek to affirm such a decision based on undisputed findings of fact and legal

conclusions consistent therewith. Judge Hill's decision is sound in law and in equity and deserves to be affirmed.

As previously noted, resulting as well as constructive trusts are an exception to the Texas Trust Act's inhibition against oral real estate trusts. While I think the facts here clearly warrant the District Judge's finding of a constructive trust, those findings also, in my opinion, clearly establish a resulting trust. As the majority recognizes, a resulting trust arises when one party buys real property with the funds of another with the understanding that the property is being held for the party that provided the money. The majority asserts that the resulting trust analysis does not apply in this case because the evidence fails to demonstrate an intent to establish a fiduciary relationship.

The District Court found, however, that such a fiduciary relationship had been established, that Whatley or his companies had purchased and held the Dyckman property with Ward's money and for his benefit and that Whatley's refusal to convey the property to Ward was a breach of that fiduciary duty. Those uncontested findings, it seems obvious to me, establish a resulting trust. *See, e.g., ATkins v. Carson,* 467 S.W.2d 495, 500 (Tex.Civ.App.1971); *Grasty v. Wood,* 230 S.W.2d 568 (Tex.Civ.App.1950); *cf. Carson v. White,* 456 S.W.2d 212 (Tex.Civ.App.1970) (no resulting trust absent evidence of the source of the funds used to purchase the property).

The fact that Ward has not urged the resulting trust analysis or that the District Court found a constructive trust rather than a resulting trust or both does not change the facts or warrant the majority's dogged refusal to acknowledge that Texas law would impose a resulting trust on the basis of those unchallenged facts. All concerned understood that Whatley was acting in connection with the Dyckman property on behalf of Ward until 1972 when Whatley for the first time sought to deny it. Unless this Court rejects the District Court's uncontested findings, which it is my understanding an appellate court may not do, all the elements of a resulting trust are here present.

Two other matters concern me. First, while I agree with the

District Court's finding that Ward is entitled to the interpleaded funds, if equity is to be accomplished, Whatley or his companies, notwithstanding their refusal to accept Ward's check in payment thereof, are entitled to be reimbursed for any out-of-pocket expenses which they incurred with respect to the Dyckman property. Accordingly, I would remand to the trial court with instructions to enter a judgment consistent with this opinion.

Second, the record indicates that Ward purchased the $25,500 note secured by the vendor's lien and trust deed from Dyckman in 1973 prior to the foreclosure for some $38,000. The record does not indicate that he recovered that amount. This may be because, in light of the District Judge's decision, the question was moot. If Whatley is to receive the proceeds of the foreclosure sale, however, certainly Ward, as the holder of the trust deed, is entitled to recover with interest the amount he paid Dyckman. It may be that Ward has previously recovered that amount, although Whatley's trial brief indicates that Ward has not. If not, he should certainly do so now although the majority does not deal with the question.

III. CONCLUSION

Given the uncontested facts found by the District Court, my reading of Texas trust law and my understanding of the role of a federal appellate court, I would affirm, remanding only to permit appellees to be reimbursed for any out-of-pocket expenses they incurred with respect to the Dyckman property. I cannot in good conscience join in a decision which will reward perfidy and breach of trust with more than $270,000, an amount which, even in Texas, must be substantial.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1108

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY TITLE COMPANY, INC., ET AL.,
DEFENDANTS-APPELLANTS,

versus

TRAVIS WARD,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(March 12, 1984)

ON MOTIONS FOR RECALL OF MANDATE

Before, WILLIAMS and JOLLY, Circuit Judges,
and WILL*, District Judge.

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*Hon. Hubert L. Will, Senior District Judge
of the Northern District of Illinois,
sitting by designation.

PER CURIAM:

In this case we reversed and rendered the decision of the district court impressing a constructive trust in favor of appellee, Travis Ward, on the proceeds from the sale of property owned by Sentry Title. 715 F.2d 941 (5th Cir. 1983). Suggestion for rehearing en banc and motion for panel rehearing by appellee, Ward, were denied on October 26, 1983. On November 16, 1983, we entered an Order denying appellee's motion for stay of mandate.

We now have before us appellee's motion for recall of mandate under Fifth Circuit Local Rule 41.2, which provides: "A mandate once issued shall not be recalled except to prevent injustice." Two grounds are claimed. The first and important ground is the assertion that our decision in refusing to impress a constructive trust in favor of Ward against Sentry Title on the proceeds from the sale of the land involved was erroneous. This ground constitutes the same attack upon our decision that was made in the motion for panel rehearing and the suggestion for rehearing en banc. In addition, appellee moves for recall of the mandate on the ground that Ward had contributed certain specific sums of money to the purchase of the property at issue and any judgment should provide that Ward was entitled to reimbursement for those sums out of the judgment rendered in favor of Sentry Title.

Sentry Title files a motion to recall the mandate claiming the right to interest on the proceeds from the sale of the property, which were paid to Ward from the registry of the district court following the judgment of the district court, which sums Sentry Title is now entitled to under the judgment of this Court.

The facts of this case are fully reported in our opinion cited above. We do not repeat them here. On the fundamental issue raised by appellee asserting that we were in error in refusing to impress a constructive trust on the proceeds of the sale of the tract at issue, the Dyckman property, we follow our prior decision and deny the motion to recall the mandate. Appellee argues, as do amici curai the Texas Independent Producers and Royalty Owners Association and the Greater Dallas Board of Realtors, that we misapplied Texas law by requiring a prior relationship of trust and confidence between the parties of "long duration" before a constructive trust could be recognized. In this case

whatever was the relationship between Ward and Whatley, the parties involved, it was not of long duration.

The emphasis upon long duration of the prior relationship of trust and confidence between the parties comes from the wording of various Texas decisions. It is not at all a controlling factor, but it is only one factor to be considered. We clearly recognized this in our original decision. A careful reading of our opinion reveals that we did not rely upon a requirement of long duration of prior relationship of trust and confidence. To the contrary at the beginning of our discussion of the issue and at the end of our discussion of the issue, we did not refer to long duration of the relationship at all. At the beginning of our discussion, 715 F.2d at 946, we stated, "In recognizing a constructive trust, the critical requirement for purposes of this case is that the parties have a confidential or fiduciary relationship prior to and apart from the transaction in question." There is no mention of length of such a relationship. Then at the end of our opinion where we state our holding, in the section entitled "Conclusion", we say: "We find that the district court erred in finding a pre-existing confidential relationship between Ward, Whatley, and Hart prior to and separate from the Dyckman tract transactions." *Id.* at 950. In that final conclusory section there is no reference whatsoever to a requirement of "long duration".

We recognize that the Texas law, in the absence of fraud, places almost controlling emphasis upon the requirement that there must be a *pre-existing* confidential relationship of trust and confidence between the parties before the dealings which give rise to a constructive trust. There was no such pre-existing relationship in this case. As the facts clearly reveal, the relationship of trust and confidence between Ward and Whatley began with the dealings relating to Whatley serving as Ward's "front" to bid on the 490 acre tract owned by Tarrant County. Both of the other real estate dealings in question are directly tied into that fundamental transaction. They are not separate and independent dealings. The first of these is the agreement under which Ward aided Whatley in taking up an option to buy some land in Athens, Texas. It is clear from the record that this agreement by Ward was a quid pro quo for Whatley bidding for Ward on the Tarrant County land.

The land deal which is at issue in this case, the Dyckman tract deal, was directly related to the undertaking to purchase the Tarrant County tract. It was understood between the parties that if Ward could obtain the Dyckman land, again using Whatley as a "front", it might help Ward in his dispute with Tarrant County concerning the bidding on the 490 acre tract. One could hardly imagine a more close knit relationship between the Dyckman tract deal and the original Tarrant County bidding. The Tarrant County land deal cannot serve to establish a pre-existing relationship for the Dyckman land deal. It follows there was no pre-existing relationship of trust and confidence between Ward and Whatley before their dealings began to obtain the 490 acre tract from Tarrant County by way of bid. Then, both the Athens land deal and the Dyckman tract deal were inextricably interwoven with that fundamental business relationship, the only business relationship between the parties.

Since the agreement on the Dyckman tract was oral, and since it was not based upon a pre-existing confidential relationship involving separate and independent relations between the parties, the Statute of Frauds, applied with full force to that deal, and no constructive trust could be created. As we stated in our original opinion, this is the very kind of situation the Statute of Frauds was meant to control. There is a noticeable lack of discussion of the Statute of Frauds and its purpose in the briefs of appellees on this issue. We recognize that each case under Texas law turns upon its own facts. The facts were established and found by the district court, but under those facts the requisites to the establishment of the constructive trust in Texas law were not met.

Appellee Ward's motion for recall of the mandate on the ground that Ward is entitled to certain funds advanced to Whatley for the purchase of the Dyckman tract is GRANTED. The Court felt that it was clear from its opinion that those sums could be retained by Ward when the other sums which Ward had received from the registry of the court after the district court's judgment were turned over to Whatley in accordance with our mandate. In view of the claims now made by Ward, we cannot tell precisely from the record the amount of money involved to which Ward is entitled. We therefore modify the mandate to remand rather than render so that the district court can determine that

sum with precision on the basis of its findings. This conclusion is also related to the modification of our mandate to reverse and remand contained in the next paragraph.

We GRANT the motion of appellant Sentry Title to recall the mandate. We reverse and remand to allow the district court to determine what interest if any is payable to Sentry Title in its recovery from Ward of the sums to which it is entitled under our decision after the amount in the registry of the district court was paid to Ward pursuant to the judgment of the court.

In summary: we recall our mandate in this case. The judgment of the district court is REVERSED and REMANDED to the district court for further proceedings and entry of judgment in accordance with this opinion. Our original decision in this case, 715 F.2d 941 (5th Cir. 1983), stands unchanged except as follows: The case is returned to the district court solely for the court to determine (1) the amount of money which appellee Ward is entitled to deduct as his actual out-of-pocket expenditures, plus interest in the discretion of the district court, in connection with the Dyckman tract purchases as he complies with the mandate of the Court to pay over to Sentry Title the proceeds from the sale of the Dyckman tract, and for the court to determine (2) the interest which should be paid to Sentry Title by Ward on the sum to which Sentry Title is entitled under our mandate as proceeds from the Dyckman tract after deduction of Ward's actual costs advanced in the purchase and maintenance of title in the Dyckman tract and commencing on the date the funds plus accrued interest were paid from the registry of the court to appellee Ward.

REVERSED AND REMANDED.

Harris v. Sentry Title Co., Inc.

No. 82-1108 (5th Cir.)

WILL, District Judge, dissenting:

In its September 26, 1983 opinion in this matter, the majority of this panel accepted the unchallenged finding of the District Court below that the business dealings between Travis Ward and Alan Whatley began months before those two had any discussion about acquiring the so-called Dyckman property, the subject-matter of this lawsuit. 715 F.2d at 948. The majority necessarily

also accepted the District Court's additional, unchallenged finding of fact, *see Smith v. Bolin*, 153 Tex. 486, 271 S.W.2d 93, 97 (1954), that those earlier business dealings created a fiduciary relationship between Ward and Whatley. 715 F.2d at 949.

The majority held, however, that the prior fiduciary relationship between Ward and Whatley was not of sufficient long standing to justify the imposition of a constructive trust:

> *To show a constructive trust, a plaintiff must first show*, by a preponderance of the evidence, . . . that the parties had a *long-standing* fiduciary or confidential trusting relationship unrelated to the subject transaction. . . whether or not a fiduciary relationship exists is a question of *fact*, . . . but whether a relationship is sufficiently *longstanding* to support imposition of a constructive trust is a question of law. . . We find as a matter of law that the dealings between Ward and Whatley in this case were not sufficiently *longstanding* to support the district court's application of a constructive trust. [Emphasis added.]

715 F.2d at 948.

And again, the majority said:

> Even if one were to count the additional time during which Whatley's companies held the tract, it would be difficult on the facts of this case to find a *longlasting* independent relationship between Ward and Whatley or his companies." [Emphasis added.]

Ibid. at 949.

Finally the majority re-emphasized its position later in its opinion:

> The business dealings between Ward and Whatley, whatever their nature, were not of *sufficient duration* or intensity to justify the imposition of a constructive trust. *The first of the two requirements to establish a constructive trust was not met.* [Emphasis added.]

Ibid. at 949.

I would not have dissented on September 26, 1983 had it not been the case (1) that Ward and Whatley, as a matter of undisputed fact, had a fiduciary relationship prior to their decision

to acquire the Dyckman property and (2) that, considering this fact, Texas law would permit the imposition of a constructive trust without, as the majority's original opinion clearly held, an absolute first requirement that the prior relationship have been "long-standing," "long-lasting," or of "sufficient duration."

The majority appears now to concede that its earlier view of the Texas law was incorrect:

> A careful reading of our opinion reveals that we did not rely upon a requirement of long duration of prior relationship of trust and confidence. To the contrary at the beginning of our discussion of the issue and at the end of our discussion of the issue, we did not refer to the long duration of the relationship at all.

Per Curiam Opinion of_____at 3. With all due respect, the majority opinion stated categorically as quoted above that a "long-standing" or "long-lasting" fiduciary relationship is, under Texas law, the *first* requirement of a constructive trust.

Moreover, the headnotes for the original published opinion, 715 F.2d 941, indicate that the majority so held.

Headnote No. 1 reads:

> **1. Trusts 91**
>
> "Constructive trust" is equitable remedy that can infer fiduciary-like relationship within transaction for purpose of promoting justice and that can be imposed on parties whose course of conduct over *long, pre-existing period* suggests that relationship of confidence and trust was assumed by parties to subject action. [Emphasis added.]

Headnote No. 17 reads:

> **17. Trusts 110**
>
> To show constructive trust under Texas law, plaintiff must *first* show, by preponderance of evidence, that parties had *longstanding* fiduciary or confidential, trusting relationship unrelated to subject transaction. [Emphasis added.]

Headnote No. 18 reads:

> **18. Trusts 103**
>
> Under Texas law, whether or not fiduciary relationship exists is question of fact, but whether relationship is sufficiently *longstanding* to support imposition of constructive trust is question of law. [Emphasis added.]

Now, however, the majority finds, contrary to the undisputed fact, that there was no prior fiduciary or confidential relationship between these parties:

> We recognize that the Texas law, in the absence of fraud, places almost controlling emphasis upon the requirement that there must be a *pre-existing* confidential relationship of trust and confidence between the parties before the dealings which give rise to a constructive trust. There was no such pre-existing relationship in this case.

Per Curiam Opinion of _____ at 4.

The district court found as a fact which was not disputed on appeal that a confidential or fiduciary relationship existed between Ward and Whatley prior to and apart from their Dyckman property dealings. On what basis the majority now can reverse that undisputed fact finding, I do not understand.

The majority also suggests that, because the Dyckman acquisition was "directly related" to the parties' prior dealings and was "not separate and independent" from those prior dealings, somehow, the pre-existing fiduciary relationship will not, under Texas law, support a constructive trust. *Ibid.* I can find no Texas case so holding. In addition, this ignores the critical, undisputed fact that Ward and Whatley did not discuss or contemplate acquiring Dyckman until months after their fiduciary relationship had been established. Moreover, the majority's current insistence that, in order to impose a constructive trust, the prior dealings must have been *"separate"* from the subject transaction is ironic in light of the requirement of Texas law that a constructive trust may *only* be imposed where the subject transaction is *within* the scope of the parties' prior dealings. *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977).

I am in agreement with the partial grant of appellee Ward's motion to recall the mandate since it reflects recognition of another of the errors in the original opinion to which I referred in my dissent. But the basic error of the majority holding remains uncorrected. A man who admittedly breached his fiduciary duty is still to be rewarded by receiving what now appears to be in excess of $400,000 when neither the uncontested facts nor the Texas law justify, much less require, such an unjust and inequitable result.

Having apparently abandoned its earlier effort to rewrite the Texas law, the majority now seeks to rewrite the undisputed facts of this case. For the reasons stated in my original dissenting opinion and herein, I deplore both efforts and, accordingly, again dissent.

APPENDIX B

FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. CA-3-75-0680-D

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY DEVELOPMENT CORPORATION, ET AL, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for hearing and trial, the Court, after having heard the evidence, considered the parties briefs and the arguments of counsel, makes the following findings of fact and conclusions of law.

Findings of Fact

1. By way of this interpleader action Larry D. Harris (Harris), plaintiff, seeks to have this court determine the ownership of $250,000 which are the proceeds from the sale at foreclosure of a 9 acre tract of land known as "the Dyckman property." This tract of land had been purchased from Stewart R. Dyckman (Dyckman) in the name of Home Engineering, Inc. (Home), defendant, which had given a Deed of Trust on the tract of land to secure a promissory note in favor of Dyckman (the Dyckman Note) with which Home purchased the Dyckman property. The Dyckman Note was sold to Bob John Robinson (Robinson). Home then defaulted on the Dyckman Note. A foreclosure sale was held under the Deed of Trust and the Dyckman property was sold to Travis Ward (Ward), defendant for $250,000. This action was then initiated by Harris, trust under the Deed of Trust, and the $250,000 (the fund) was placed in the registry of this Court subject to the claims of those asserting ownerships thereto.

2. Harris sought to recover from the fund substitute trustee's fees and attorney's fees he incurred as a result of the foreclosure sale and the filing of this action. Harris' claims were disposed of by Order of this Court filed April 23, 1981.

3. J. Lawson Goggans (Goggans), defendant, was the attorney for Dyckman with respect to Dyckman's efforts to collect the Dyckman Note. Thereafter, Goggans acted as Robinson's attorney in Robinson's effort to collect the Dyckman note. On the date of foreclosure the amount owing on the Dyckman Note was $38,855.51. Goggans claims that the Dyckman provided that ten percent (10%) of the principal and interest due would be payable as attorney's fees if the Dyckman Note was placed in the hands of an attorney for collection. Thus, Goggans seeks recovery of the sum of $3,885.55 from the fund as an attorney's fee. Goggans contends that his claim is prior and superior to that of any other defendant.

4. The claims of the Internal Revenue Service (IRS) have been fully satisfied , and the IRS was dismissed as a party to this action Order of this Court filed May 23, 1979.

5. All parties agree that the holder of the Dyckman Note is entitled to the first payment out of the remainder of the fund.

6. Ward seeks to recover the remainder of the fund on the ground that Home took title to the Dyckman property on his behalf, thereby creating an equitable title to the Dyckman property in Ward. Thus, Ward claims that the proceeds of the sale now represented by the fund belong to him.

7. Texas Engineering Associates (Texas Engineering), defendant claims that it is the holder of a recorded abstract of judgment again. Sentry Title Company, Inc. (Sentry), defendant, filed of record on December 5, 1974, in Henderson County, Texas. The judgment is in the sum of $837.53, plus attorneys' fees of $400, with interest on said amounts at the rate of ten percent (10%) per annum, plus $24 as costs action. Texas Engineering seeks recovery of this judgment out of the proceeds of the fund to which Sentry is entitled.

8. Sentry seeks to recover the remainder of the fund on the ground that it was the record title holder of the Dyckman property at the time it was sold at the foreclosure sale. Prior to the

foreclosure sale Home had deeded the Dyckman property to Sentry, but retained a lien thereon.

9. Home and Alan D. Whatley, defendant, claim the remainder of the fund through Sentry.

10. In early 1970 Ward learned that the Tarrant County Water Board (the Water Board) planned to sell 490 acres of land near Cedar Creek Lake, Henderson County, Texas (the 490 acres).

11. Ward desired to purchase the 490 acres. Whatley and Bill (Hart), Whatley's attorney and agent and also Home's attorney and agent were acquainted with several members of the Water Board and had dealt with the Water Board in the past. Ward sought Whatley's and Hart's help in submitting a bid for the 490 acres.

12. Whatley and Hart agreed to help Ward submit a bid for the 490 acres. In return (Hart) was to receive $30,000 to $35,000 if the 490 acres was acquired by Ward. Whatley was to be compensated by obtaining Ward's aid on another land transaction involving 16 acres in Athens, Texas (the Athens property). Whatley had a contract to purchase the Athens property for approximately $80,000. Ward agreed to provide Whatley $20,800 for the down payment on the Athens property, which the parties agreed was to be owned equally by Whatley and Ward.

13. In March 1970 Ward provided Whatley with $20,800 in the form of a loan from State National Bank of Corsicana, Texas, to be used as down payment on the Athens property. Ward was the majority stockholder and an officer of the bank and arranged for Whatley to obtain this loan. The loan was made in Whatley's name because the bank examiner objected to a bank officer obtaining a loan from the bank. Ward later paid this note out of his personal funds.

14. In April 1970 the Athens property was acquired by Whatley using the $20,800 loan proceeds from the Corsicana bank as a down payment. The Athens property was acquired in the name of Home, which at the time was owned by Whatley. Home later conveyed the Athens property to A.D.W. Enterprises, who then conveyed the property to Computer Land Title, Inc.

15. In early 1970 Whatley, Hart and Ward began to discuss the 490 acres and how to bid for it. For various reasons, including

Ward's fear that the price would go up if his name was used, Ward did not want to bid for or take title to the 490 acres in his name. Therefore, the parties discussed the possibility of using Home as an entity which would bid for and take title to the 490 acres.

16. On July 6, 1970, a bid of $480,000 for the 490 acres was submitted by Hart to the Water Board. This bid was made by Hart on behalf of Ward.

17. On July 6 two more bids were submitted to the Water Board for the 490 acre tract. Ward submitted a bid in the amount of $511,000 in the name of one of his companies, Pan American Properties, Inc. Home submitted a bid of $771,750 in its name on behalf of Ward. These two bids were submitted in order to assure that Ward obtained the 490 acre at the lowest price. If the $771,750 bid was the highest and the $511,000 was the next highest, the parties planned to have Home withdraw the $771,750 bid. On the same date another bid of $1,527 per acre, or $748,230, was submitted by Spanish Shores for the 490 acres.

18. Upon receipt of Spanish Shores' bid the Water Board indicated that it was the highest bid. In an effort to demonstrate to the Water Board that the Home bid of $771,000 was the best offer, Ward requested and received an analysis of Spanish Shores' bid and Home's bid from the Republic National Bank in Dallas, Texas, which was submitted to the Water Board. The Water Board planned to meet to discuss the offers on July 28.

19. Between July 6 and July 28 Whatley, Hart and Ward had two meetings. At these meetings they discussed the purchase of the Dyckman property by Ward. The Dyckman property abutted and possessed an easement over the 490 acres. Whatley and Hart had earlier entered into negotiations with Dyckman to purchase the Dyckman property. The parties decided that Ward's bids before the Water Board to acquire the 490 acres would be greatly enhanced if the Dyckman property was acquired by Ward prior to the July 28 Water Board meeting. Ward gave Hart $600 for his expenses to acquire the Dyckman property from Dyckman. Hart thereafter reached an agreement with Dyckman to purchase the Dyckman property for $30,500.

20. About July 24 Home acquired the Dyckman property on

behalf of Ward by way of a Warranty Deed. The consideration for this sale consisted of a $5,000 down payment furnished by Ward from his personal funds and a promissory note in the principal sum of $25,500 executed by Home secured by a vendor's lien and deed of trust on the Dyckman property. The Dyckman property was later conveyed by Home to Sentry shortly after Sentry was formed in 1972 by Whatley.

21. At about the same time Whatley, Hart and Ward also discussed acquiring the right to prosecute a law suit against the Water Board to recover some land previously owned by Jack and Pauline Lacy (the Lacys) which was a part of the 490 acres but which had been sold by the Lacy's to the Water Board. It was contemplated by the parties that the acquisition of the Lacy lawsuit would enhance Ward's efforts to acquire the 490 acres. The right to prosecute the Lacy lawsuit was acquired from the Lacys by Whatley in August 1970. Wilis Moore (Moore), Ward's attorney, assisted in the acquisition of the Lacy lawsuit and Ward paid Moore's attorney's fees for filing and prosecuting the Lacy lawsuit. Later, another attorney was hired and paid for by Ward to assist in the prosecution of the Lacy lawsuit. In June 1971 Moore and Ward attempted to settle the Lacy lawsuit with the Water Board in exchange for Ward's right to acquire the 490 acres.

22. At this same time Ward engaged Hart to obtain for him a reversionary interest that Dyckman owned in a portion of the 490 acres, but Hart was unable to do so.

23. By securing the Dyckman property and accompanying easement on the 490 acres, the Lacy lawsuit and the Dyckman's reversionary interest, Ward hoped to be in a better bargaining position with the Water Board his efforts to acquire the 490 acres and to discourage other bidders for the 490 acres.

24. The above transactions were entered into pursuant to an agreement between Ward and Whatley that Whatley would take and hold title to the property which was the subject of each transaction in Whatley's name or in the name of an entity owned by Whatley for the use and benefit of Ward. By virtue thereof a "fiduciary relationship" was created and existed between Ward and Whatley as to the acquisition of the Dyckman property.

25. At the July 29, 1970, meeting of the Water Board the bids for the 490 acres were rejected and new bidding was scheduled on October 1971.

26. On November 16, 1970, at Ward's request, Whatley conveyed lake lot to M. O. Atterbury, a friend of Ward. The lot was worth between $4750 and $6500. This conveyance was not made in return for the $5000 furnished by Ward as the down payment on the Dyckman property.

27. On April 21, 1971, Whatley billed Ward for expenses he had incurred in connection with their land transactions. These expenses included the clearing of brush from the Athens property, interest on the Athens property, interest on the Dyckman property, and the expense of a survey done on the Dyckman property.

28. On October 15, 1971, two bids were submitted to the Water Board for the 490 acres. Sentry though Whatley, its president, submitted a bid of $750,000. Eastern Resort Properties submitted a bid of $801,150.

29. Another series of bids was taken by the Water Board on February 10, 1972. Sentry made a bid of $807,256, Eastern Resort Properties made a bid of $762,888, and Cedar Creek Enterprises made a bid of $785,000. On the basis of these bids the Water Board sold the 490 acres to Sentry on May 25, 1972. Ward did not bid on the 490 acres and abandoned his efforts to acquire the tract because he was of the opinion that the price being sought by the Water Board was too high.

30. In April 1972 Whatley advised Ward that title to the Dyckman property was not being held by Whatley or an entity controlled by Whatley for the use and benefit of Ward. At the time Whatley and Ward had a physical altercation over the status of their relationship. Prior to this Ward did not know that Whatley and Home were asserting an adverse interest to the Dyckman property. Subsequently, on May 16, 1972, Ward forwarded a check to Whatley for the expenses Whatley had billed him on April 21, 1971, in connection with their land transactions. Whatley rejected Ward's check.

31. In August 1972 Ward filed suit in Henderson County, Texas, against Whatley, Home, and Community Engineering. In this action Ward asserted his claim to the Dyckman proper-

ty. Ward later joined Sentry as a defendant in this action. Sentry defaulted and Ward then nonsuited the other defendants in order to obtain a final judgment against Sentry. He then immediately reasserted his claims against Whatley, Home and Community Engineering in another action filed in Henderson County in September, 1973.

32. On January 22, 1973, Sentry acquired the Dyckman property from Home. Sentry had knowledge of Ward's beneficial interest in the Dyckman property when it acquired the Dyckman property.

33. On November 14, 1974, an involuntary petition in bankruptcy was filed in Dallas, Texas, against Whatley and Home, ADW Enterprises, Community Engineering, Inc., Uticor Corp., H & D Construction Co., Inc., and Computer Land Title Co., Inc. These companies were controlled in whole or part by Whatley.

34. On November 4, 1975, Home filed a voluntary petition under Chapter XI in bankruptcy in Tyler, Texas. In this action Jerry Bain (Bain) was named as Trustee.

35. In February 1976 the Dallas bankruptcy actions were consolidated with the Tyler action, and statements of affairs and schedules were filed on behalf of all of the entities before the bankruptcy court. Sentry was not included in any of these proceedings. Neither the Dyckman property nor the Athens property was listed on any of the bankruptcy schedules. Ward was not sent official notice of these proceedings nor was he listed as a creditor of the entities involved in the bankruptcy proceedings.

36. The order confirming the plan of arrangement and the arrangement in the consolidated bankruptcy actions was signed October 10, 1979.

37. During the pendency of the bankruptcy proceedings, Bain spoke to Moore, Ward's attorney, and he knew that Moore represented Ward. Ward had knowledge of the bankruptcy proceedings, but he did not file a claim in the proceedings. Bain had knowledge of the Ward-Whatley state litigation over the Dyckman property, but he made no effort to intervene in such litigation and assert an ownership interest in the property on behalf of the debtors in bankruptcy.

38. Sentry's Certificate of Authority was forfeited in 1979 by the Texas Secretary of State, and it was reinstated on April 30, 1981.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Ward's claims to impose a constructive trust on the fund are not barred by the Texas Statute of Frauds, Tex. Bus. & Com. Code Ann. tit. 3, §26.01. *See Palmer v. Fuqua*, 641 F.2d 1146, 1159 (5th Cir. 1981); *Ginther v. Taub*, 570 S.W.2d 516, 525 (Tex. Civ. App. - Waco 1978, writ ref'd n.r.e).

3. An action to enforce a "constructive trust" upon property must be brought within four years of the date the cause of action arose. *See Miles v. Martin*, 321 S.W.2d 62, 69 (Tex. 1959); *Field Measurement Service Inc. v. Ives*, 609 S.W.2d 615, 620 (Tex. Civ. App. - Corpus Christi 1980, writ ref. n.r.e.) Ward's cause of action based on a constructive trust theory did not arise until such time as (1) he discovered the fraud on which he bases his claims or (2) he should have through reasonable diligence discovered such fraud. *Id.; Id.* at 619. However, when a confidential relationship exists between parties, the "diligence on the party defrauded does not exact as prompt and as searching an inquiry into the conduct of the other party as where the parties were strangers or were dealing with strangers." *Bush v. Stone*, 500 S.W.2d 885, 890 (Tex. Civ. App. - Corpus Christi 1973, writ ref. n.r.e.). Consequently, since Ward had no reason to know prior to April 1972 that Whatley and Home were asserting an interest in the Dyckman property which was adverse to him. Ward's cause of action arose in April 1972 when he first became aware of Whatley's and Home's adverse claims to the Dyckman property. Ward filed a suit against Home and Whatley within four years of his discovery of the fraud. He also made claims on Sentry for the Dyckman property within the limitations period. Thus, Ward's cause of action asserting ownership to the fund is not barred by the statute of limitations.

4. Ward's claims are not barred by the discharge in bankruptcy of Whatley and Home. A discharge in bankruptcy operates as an injunction against the commencement or continuation of

an action to collect, recovery, or offset a debt of the debtor. *See* 11 U.S.C. §524(a) (2). Such a discharge is personal to the bankrupt and does not release others who may be jointly liable with the debtor. *See Swinford v. Allied Finance Co.*, 424 S.W.2d 298 (Tex. Civ. App., writ dismissed), *cert. denied*, 393 U.S. 923 (1968). In addition, the owner of a beneficial interest in property can recover that interest from one who took the property with knowledge that the property is subject to a trust. *See Richards v. Combest*, 208 S.W.2d 392 (Tex. Civ. App. - Beaumont 1947, writ ref. n.r.e. Consequently, since Sentry was aware of Ward's claim to the Dyckman property Ward can properly assert his claim to the Dyckman property against Sentry; and since Sentry was not a debtor in the bankruptcy proceedings, the discharge in bankruptcy of Whatley, Home and Community Engineering which took place after Sentry acquired title to the Dyckman property does not bar Ward's claim to the fund. This conclusion is supported by the fact that neither Whatley nor Home made any claim to the Dyckman property during their bankruptcy proceedings, that Ward did not, as a creditor of Whatley or Home, receive official notice of the proceedings, and that Bain, as trustee in bankruptcy, knowingly chose not to become involved in the litigation surrounding the Dyckman property.

5. To establish a "constructive trust" as to the Dyckman property his favor Ward must show by preponderance of the evidence, *see Putaturo v. Crook*, 653 F.2d 1027 (5th Cir. 1981), that a confidential or fiduciary relationship existed prior and apart from the agreement upon which relied is sought, that the agreement sued upon was within the scope of the relationship; *see Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977), or that it would be inequitable to allow the title holder to retain the property subject to the agreement, *see Panama-Williams, Inc. v. Lipsey*, 576 S.W.2d 426 (Tex. Civ. App. - Houston (1st Dist.) 1978, writ ref. n.r.e.). The prior relationship, however, need not be based upon a written agreement between the parties; it can arise from a purely personal or informal relationship, where trust and confidence have been reposed by the parties by reason of the relationship. *See Fitz-Gerald v. Hull*, S.W.2d 256, 261 (Tex. 1951); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Ginther v. Taub*, *supra* at 525. *See, also, generally Tyra v. Wood-*

son, 495 S.W.2d 211 (Tex. 1973); *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333 (Tex. 1966).

6. Whether the relationship of the parties is a fiduciary relationship upon disputed evidence is a question of fact. *See Schiller v. Elick*, 240 S.W.2d 997, 999 (Tex. 1951).

7. Ward has established that prior to and apart from Whatley, Hart's agreement to acquire the Dyckman property in the name of Home Ward, a fiduciary, confidential relationship existed between Ward, and Hart. This confidential relationship arose when Whatley and Hart agreed to assist Ward obtain the 490 acres, and it extended to the land ventures they joined in. In addition, the agreement to buy the Dyckman property was clearly within the scope of that prior agreement and in furtherance of the prior agreement. Finally, Ward has established to allow Whatley and Sentry any interest in the fund would unjustly enrich Whatley and Sentry.

8. Ward has established that Home and Whatley, individually owner of Home, acted under a fiduciary relationship with him when Hart acquired the Dyckman property; that Home and Whatley, as owner of Home, held title to the Dyckman property in constructive trust for him; that Home's failure to transfer title of the Dyckman property to him and subsequent transfer of title to Sentry was in breach of this fiduciary relationship; and that at the time of foreclosure of the Dyckman Note Sentry held the Dyckman property in trust for him.

9. Ward is entitled to have a constructive trust imposed on the fund and recover the fund after the payment of superior claims thereto.

10. Goggans' claim for attorney's fees in the amount of $3,885 is superior to Ward's claim.

11. Ward's claim is superior to the claims of the other defendant.

12. Harris and Goggans should recover their costs of action out of the fund. Ward should recover his costs of action from Whatley and Home. All other parties should bear their own costs.

13. Counsel for Ward should prepare a judgment in accordance with these findings of fact and conclusions of law and other orders of this Court.

Dated this 25th day of November, 1981.

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. CA 3-75-0680-D

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY DEVELOPMENT CORPORATION, ET AL., DEFENDANTS

AMENDED PROPOSED FINDINGS OF FACTS AND PROPOSED CONCLUSIONS OF LAW OF DEFENDANT TRAVIS WARD

COMES NOW, Defendant Travis Ward ("Ward") and files this his Amended Proposed Findings of Fact and Proposed Conclusions of Law and would show the Court as follows:

I.

PROPOSED FINDINGS OF FACTS

1. Defendant Ward, in or about January or February, 1970, entered into a confidential relationship with Defendant Whatley and his agent, Hart, the objective of which was to acquire 490 acres of land from the Tarrant County Water Board.

2. Arising out the relationship referred to in paragraph 1 and within the scope of the relationship Defendant Whatley and Hart acquired by agreement and for consideration other properties as part of the relationship.

3. The other properties to be acquired by Defendant Whatley and Hart included: (a) a 16 acre tract of land in Athens, Texas to be held in an equal partnership between Defendant Ward and Defendant Whatley; and (b) 29 acres of land known as the Lacy property.

4. The Lacy property was to be acquired through the acquisition of a lawsuit by the Lacys against the Tarrant County Water Board whereby Defendant Ward agreed to pay $10,000 and attorneys' fees to the Lacys, if successful in the suit.

5. Defendant Ward in the performance and discharge of his obligations by virtue of his agreement with Defendant Whatley did: (a) secure financing for the down payment on the 16 acre tract of land in Athens, Texas; and (b) paid attorneys' fees and expenses related to the acquisition and prosecution of the Lacy lawsuit;

6. Defendant Ward and Defendant Whatley ("Whatley") had on or before July 25, 1970 a confidential or trust relationship, in part providing for William E. Hart ("Hart") to be Whatley's agent with Hart also acting from time to time on behalf of Ward;

7. In the course of such confidential or trust relationship, Ward and Whatley agreed that Whatley and/or Hart as the agent would acquire in 1970 the property which was sold at the Trustee's sale on May 6, 1975 (the "Property") for the benefit of Ward, either in Whatley's name or the name of the entity chosen by Whatley to hold legal title to the Property;

8. Ward provided the original $5,000 (and expense money for Hart) to acquire the Property;

9. As a part of the arrangement between Ward and Whatley arising out of the confidential or trust relationship, Ward and Whatley agreed that legal title to the Property would be conveyed to Ward at a future date upon the demand of Ward and the payment by Ward of the remaining purchase price for the Property;

10. Defendant, Sentry Development Corporation ("Sentry") knew of or should have known of the equitable ownership interest of Ward to the Property at the time Sentry acquired the Property;

11. Whatley and Home Engineering, Inc. ("Home") knew or should have known of the equitable ownership interest of Ward in the Property at the time Whatley and Home acquired an interest in the Property;

12. Defendant Whatley, individually, and through his agent, Hart, did acquire the 16 acre tract of land in Athens, Texas, the

Property and the Lacy lawsuit in the name of Home for the benefit of Defendant Ward;

13. Defendant Whatley, acting individually and on behalf of Home and Sentry, did, after acquiring the various properties for the benefit of Defendant Ward, convey various parcels of the property to other entities controlled by Defendant Whatley without the knowledge of Defendant Ward.

14. Ward is entitled to the entirety of the proceeds of the Trustee's sale which were interpled into the Court (the "Fund") except for:

(i) Payment to Defendant J. Lawson Goggans ("Goggans") for that portion of the Fund representing the reasonable attorneys' fees incurred in his representation of the holder of the note secured by the Deed of Trust foreclosed upon;

(ii) Payment to Plaintiff Larry D. Harris ("Harris") for that portion of the Fund representing a reasonable Trustee's fee as provided in the Deed of Trust foreclosed upon.

15. Sentry has had its corporate charter from the State of Texas forfeited;

16. Ward is the owner and holder of the note which was secured by the Deed of Trust foreclosed upon.

PROPOSED CONCLUSIONS OF LAW

1. Ward acquired equitable ownership of the Property at the time Home first held legal title to the Property, and Ward's equitable ownership interest continued up to and through the time when he acquired record title by virtue of a Substitute Trustee's Deed in May, 1975;

2. A constructive trust arose in favor of Ward on the Property at the time Home first held record title to the Property, and thereafter, the constructive trust arose on the Fund;

3. A resulting trust arose in favor of Ward on the Property at the time Home first held record title to the Property, and, thereafter, the resulting trust arose in favor of Ward on the Fund;

4. The claims of Whatley, Home and Sentry are barred by the doctrine of equitable estoppel;

5. Whatley, Home and Sentry ratified the agreement with Ward regarding the Property;

6. Sentry was not a *bona fide* purchaser for value of the Property;

7. Ward's claim to the Fund is superior to that of Texas Engineering Associates;

8. Harris is not entitled to the attorneys' fees which he seeks;

9. Sentry does not have the capacity to prosecute a judicial claim to any portion of the Fund by virtue of the forfeiture of its charter on March 19, 1979 by the State of Texas;

10. Ward's claim is not barred by the Statute of Frauds;

11. Ward's claim is not barred by the applicable Statute of Limitations;

12. Ward's claim is not barred by the Order of Confirmation entered by the Bankruptcy Court for the Eastern District of Texas in proceedings which included as debtors Whatley and Home. Neither is Ward's claim barred by res judicata or collateral estoppel;

13. Ward's claim is not barred through the doctrine of equitable estoppel.

Respectfully submitted,

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BY: _____
Ken Ford - 07226600

ATTORNEY FOR DEFENDANT
TRAVIS WARD

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. CA 3-75-0680-D

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY DEVELOPMENT CORPORATION, ET AL., DEFENDANTS

FIRST AMENDED ANSWER AND CLAIM OF DEFENDANT TRAVIS WARD

COMES NOW, TRAVIS WARD, Defendant in the above-entitled and numbered cause, ("WARD") and files this his First Amended Answer and Claim to Plaintiff's Petition in Interpleader.

1. WARD admits the allegations of Paragraph I of Plaintiff's Original Petition in Interpleader.

2. WARD admits that conflicting claims and demands have apparently been made upon Plaintiff for the proceeds held by him described in Plaintiff's Original Petition in Interpleader, ("FUND"), although WARD hereby asserts that certain of the conflicting claims and demands are not valid and true.

3. WARD denies that Defendant SENTRY DEVELOPMENT CORPORATION ("SENTRY") is entitled to any portion of the Fund.

4. WARD hereby admits and asserts that he is entitled to the entirety of the Fund, with the exception of those certain amounts hereinafter admitted as being due to other parties or defendants herein. The claim of WARD is set forth with particularity hereinafter.

5. WARD denies that Defendants HOME ENGINEERING, INC. ("HOME") and ALAN D. WHATLEY individually ("WHATLEY") are entitled to any portion of the Fund. WARD further denies that HOME and WHATLEY possess any valid claim against or interest in the real property described with particularity in Plaintiff's Original Petition in Interpleader ("PROPERTY") which property was sold by Plaintiff at the Trustee's Sale on May 6, 1975 ("SALE").

6. WARD admits that Defendant J. LAWSON GOGGANS ("GOGGANS") has a valid claim for reasonable attorney's fees in connection with the representation of the holder of the note secured by the deed of trust foreclosed upon.

7. WARD denies that Defendant TEXAS ENGINEERING ASSOCIATES has any valid claim upon the Fund.

8. WARD is without knowledge of information sufficient to form a belief as to the truth of Paragraph II.F of Plaintiff's Original Petition in Interpleader. However, WARD understands that Defendant INTERNAL REVENUE SERVICE OF THE UNITED STATES has been dismissed from this case and believes that any claim previously asserted by said Defendant has been satisfied.

9. WARD admits the allegations of Paragraph III of Plaintiff's Original Petition in Interpleader.

10. WARD denies that Plaintiff is entitled to recover a reasonable attorney's fee, as alleged in Paragraph IV of Plaintiff's Original Petition in Interpleader.

For additional defenses to the cause of action herein, and by way of counterclaim against the Plaintiff and crossclaim against the other Defendants herein, WARD states the following:

DEFENSES

11. SENTRY does not possess legal capacity to assert any claim or defense in this cause. On March 19, 1979, the charter of SENTRY was forfeited and rendered null and void by the Secretary of the State of Texas pursuant to Art. 12.17, Tex.Tax-Gen.Ann. (1969).

12. HOME and WHATLEY have heretofore filed their Original Answer, pleading therein that they do not assert any

claim to the Fund, but that a lien exists in their favor on a portion of the Property, HOME and WHATLEY have failed to state a claim upon which relief can be granted in this interpleader action.

13. HOME and WHATLEY have plead in their Original Answer that a lien exists in their favor on a portion of the Property by virtue of a deed of trust executed on January 13, 1975 whereby SENTRY conveyed a certain tract of land, including a portion of the Property, to WILLIAM E. HART, TRUSTEE, for the benefit of HOME and WHATLEY. At the time of the execution of said deed of trust HOME and WHATLEY were acting with full and complete knowledge of the equitable ownership of WARD. Neither HOME, WHATLEY or SENTRY had any authority from WARD to mortgage or otherwise convey the Property at any time after the purchase of the Property in WARD'S behalf on July 25, 1970. The lien asserted by HOME and WHATLEY against a portion of the Property is void as against WARD inasmuch as SENTRY had no express or implied authority from WARD to mortgage the Property or any part thereof.

14. SENTRY was on notice, at the time it purchased the Property from HOME, of the equitable ownership of WARD. WHATLEY was the sole stockholder and president of SENTRY and HOME. Prior to the apparent purchase of the Property from HOME by SENTRY, a *lis pendens* notice was filed by WARD against the Property and recorded in the office of the County Clerk in Henderson County, Texas.

15. WHATLEY, HOME and SENTRY are estopped from denying the equitable ownership of WARD and the existence of the agreement between WARD and WHATLEY providing for the acquisition of the Property for WARD'S benefit, due to subsequent statements and actions of WHATLEY upon which WARD relied to his detriment. Further, WHATLEY, HOME and SENTRY ratified the aforementioned agreement between WARD and WHATLEY through their statements and actions subsequent to said agreement.

CLAIM
COUNT ONE

16. WARD hereby asserts that he is entitled to the entirety of the Fund, save and except only such attorney's fees as may be due and payable to GOGGANS and such trustee's fees as may be due and payable to Plaintiff under the terms of the note secured by the deed of trust foreclosed upon at the Sale. As is detailed in the following paragraphs, WARD'S entitlement to the Fund is predicated both upon his status as owner and holder of the said note and his equitable ownership of the Property at the time of the Sale.

17. At the time of the Sale, BOB JOHN ROBISON was the owner and holder of the note secured by the deed of trust foreclosed upon. Subsequent to the Sale, said note was assigned to WARD by BOB JOHN ROBISON. Inasmuch as WARD is the owner and holder of the said note, he is entitled to that portion of the Fund which reflects the amount owed on said note.

18. On or before July 25, 1970, WARD and Defendant WHATLEY were engaged in several business transactions. Over an extended period of years and a lengthy course of dealings, WARD and WHATLEY occupied toward one another a position of mutual confidence and trust wherein the attributes of integrity and fidelity were implicit. WARD and WHATLEY repeatedly relied upon one another in various transactions and business affairs to act in a trust or confidential capacity towards one another and to protect and preserve the interests of one another.

19. In the course of the trust and confidential relationship of WHATLEY and WARD, it was agreed that WHATLEY, in his name or the name of an entity owned and controlled by him, would purchase the Property from STEWART R. DYCKMAN for WARD through the involvement of WHATLEY'S agent WILLIAM E. HART. It was agreed between WARD and WHATLEY that legal title would be conveyed to WARD at a future date upon the demand of WARD. Both parties agreed and understood that it was in WARD'S best interest that WARD'S ownership of the Property remain confidential.

20. To assist WHATLEY in the acquisition of the Property

for WARD, WARD provided the $5,000.0 down payment on the purchase of the Property. The balance of the purchase price was financed through the vendor. It was agreed and understood between WARD and WHATLEY that, at an undesignated future date, the balance of the purchase price would be reimbursed by WARD to SENTRY or to the entity chosen by him to hold legal title to the Property.

21. In April of 1972, WARD discovered facts which led him to believe that WHATLEY had breached and violated the trust and confidential relationship between the parties in regard to a collateral transaction undertaken by WHATLEY on behalf of WARD. WARD thereupon made demand upon WHATLEY, individually and as the sole shareholder and president of SENTRY, to convey to WARD the legal title to the Property to which he held equitable title. In conformity with their agreement, WARD tendered to WHATLEY, at or about the time of said demand for conveyance of legal title, his check in payment for various expenses incurred by WHATLEY, or the entity chosen by him to hold legal title to the Property, in regard to the purchase or maintenance of the Property.

22. WARD is entitled to the Fund, as particularized in Paragraph 16 hereinabove, due to the fact that WARD owned, at the time of the Sale the equitable title to the Property. At the time of the Sale, the legal title in the property was apparently held by SENTRY in violation of the trust or confidential relationship between WARD and WHATLEY. Due to the aforementioned facts, a constructive trust exists in the Fund in favor of WARD as beneficiary thereof.

COUNT TWO

23. In the alternative to Paragraph 22, but still relying upon and incorporating Paragraphs 16 through 21, WARD asserts that he is entitled to the Fund as particularized in Paragraph 16 due to the fact that WARD owned equitable title to the Property at the time of the Sale. At the time of the Sale, the legal title in the Property was apparently held by SENTRY. The Property was purchased by WHATLEY, through an entity chosen by him to hold legal title, with the down payment advanced by WARD. Further, WARD was obligated to reimburse WHATLEY, or the entity chosen by him to hold legal title, for any and all expenses

incurred in the purchase and maintenance of the Property. Due to the aforementioned facts, a resulting trust exists in the proceeds from the Sale in favor of WARD as beneficiary thereof.

WHEREFORE, Defendant WARD prays that upon final hearing hereof, the Court:

a. Deny any right, title or interest in and to the Fund on the part of SENTRY;

b. Deny any right, title or interest in and to the Fund or in the Property on the part of HOME and WHATLEY;

c. Deny any right, title or interest in and to the Fund on the part of TEXAS ENGINEERING ASSOCIATES;

d. Deny any right, title or interest in and to the Fund on the part of the INTERNAL REVENUE SERVICE OF THE UNITED STATES;

e Enter judgment for GOGGANS for that portion of the Fund representing the reasonable attorney's fee incurred in his representation of the holder of the note secured by the deed of trust foreclosed upon;

f. Enter judgment for Plaintiff LARRY D. HARRIS, for that portion of the Fund representing a reasonable trustee's fee as provided in the deed of trust foreclosed upon, but denying any claim asserted by Plaintiff for attorney's fees.

g. Enter judgment for WARD for the entirety of the Fund remaining after the claims of GOGGANS and Plaintiff LARRY D. HARRIS have been paid.

h. Enter judgment for WARD for such other and further relief as the Court may deem just and equitable.

NO. 83-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRAVIS WARD,

Petitioner,

v.

SENTRY TITLE CO., INC.,
HOME ENGINEERING, INC. AND
ALAN D. WHATLEY

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this case presents any question of important public policy?

2. Whether a review of this case would require that this Court review the entire factual record?

3. Whether the Fifth Circuit Court of Appeals correctly interpreted the substantive Texas law regarding constructive trusts?

4. Whether in reviewing the district court decision, the Fifth Circuit Court of Appeals followed the requirements of the Federal Rules of Civil Procedure and established judicial policy?

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NO. 83-1581

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent prays that the Petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in the above entitled case, entered September 26, 1983, and reaffirmed on March 12, 1984, be denied.

COUNTERSTATEMENT OF THE CASE

This case involves title to a nine acre lakefront tract of land located near Athens, Texas, referred to in this litigation as the "Dyckman Tract". Two other tracts, an adjoining 490 acre tract over which passed an easement to the Dyckman Tract and a 16 acre tract located in Athens, Texas (the "LaRue Tract") also figured prominently in this case. Title to all three tracts was taken in the name of Respondent, Sentry Title Co., Inc., or in the name of another company (Home Engineering, Inc.) controlled by Respondent's sole shareholder, Alan Whatley ("Whatley"). Petitioner sought, in this action, to impose a constructive trust on the Dyckman Tract.

Petitioner was a sophisticated and experienced businessman who had known of Whatley for several years but never met him until sometime in 1969 when they first met casually. Thereafter, beginning sometime in the spring of 1970, they met several times to discuss possible land deals in the Athens, Texas area. Their discussions finally focused on the desirability of acquiring the 490 acre tract which Whatley had been negotiating to acquire for some months.[1] Whatley and his then attorney, Bill Hart, had also previously been negotiating with Dyckman to acquire the 9 acre tract.[2] Thereafter, between July 6, 1970 and July 28, 1970, Petitioner, Whatley and Hart had two meetings concerning the purchase of the Dyckman property. On about July 24, 1970, the Dyckman Tract was sold to Home Engineering, Inc., a company controlled by Whatley, for $30,500. The purchase price included a promissory note for $25,500 from Home to Dyckman.

All subsequent payments made on the Dyckman note were made by Home and the property was rendered for ad valorem property tax purposes by Home. Whatley or his companies

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[1] *Harris v. Sentry Title Co., Inc.*, 715 F.2d 941, 944 (5th Cir. 1983) (hereinafter referred to as *Sentry Title Co.*).

[2] Findings of Fact and Conclusion of Law, Findings of Fact No. 19.

were also the makers of the promissory notes given for the other two properties.

After Home encountered financial difficulties, the Dyckman Tract was foreclosed upon and Petitioner asserted a constructive trust on the proceeds from that foreclosure, claiming that Respondent was purchasing the Dyckman Tract and the other properties for Petitioner's benefit. Throughout the proceedings in the trial court and the court of appeals, Petitioner contended that "a confidential or trust relationship between Ward and Whatley existed previously to and apart from the acquisition of the Dyckman 9 acres, sufficient to impose a constructive trust."[3] Otherwise, the Texas Statute of Frauds and Texas Trust Act would clearly have foreclosed Ward's claim. That argument having *twice* been rejected by the Fifth Circuit, Ward now advances, for the first time on appeal, two new theories, one concerning an alleged principal-agent relationship, and another based on an alleged resulting trust. Petitioner further argues that the Fifth Circuit misapplied Texas law to the facts in this case.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Any Questions Of Important Public Policy and Would Require This Court To Sift Through The Entire Factual Record To Review The Fifth Circuit's Decision.

Petitioner's discussion of the *Erie*[4] doctrine serves only to confuse the issues before this Court. It has never been disputed that Texas substantive law governs this action. The court of appeals clearly recognized this requirement[5] and correctly interpreted the controlling Texas law and applied it to the facts

[3] Post-Trial Brief of Defendant Travis Ward, pp. 2-3; Brief of Appellee p. 34; Supplemental Brief of Appellee, pp. 3-6.

[4] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937). Similarly, the Rules of Decision Action, 28 U.S.C. §1652 (1976) is of no significance in this matter.

[5] *Sentry Title Co., supra* at 945.

of this case. In truth, Petitioner does not claim an *Erie* violation but simply quarrels with the result of the Fifth Circuit's application of Texas law to the facts of this case. Petitioner's arguments have now been presented four times to the Fifth Circuit and have found no acceptance there.[6] The Petition presents no unusual questions or questions of particularly important public policy. Rather, the case is simply an ordinary exercise in the application of Texas substantive law to the facts at hand. Petitioner is merely dissatisfied with the outcome of that application.

Rather than being "fueled only by a determination to assert his equitable right to expect good faith and fair dealing in business transactions, and by a determination to defend the time honored Texas public policy that unfair dealing and unfaithful conduct should be redressed. . ."[7], Petitioner is fueled by the desire to avoid having to pay over to Respondent the rather substantial sum gained through the decision of the trial court which was reversed by the Fifth Circuit.

Petitioner claims that the court of appeals misapplied Texas law in three ways: (1) that the Court misconstrued the Texas law of constructive trusts; (2) that an alleged "technical fiduciary relationship" was established; and (3) that a resulting trust was proven. As will be seen from the discussion below, the court of appeals addressed and properly disposed of each of these issues in its opinions. More significantly, Petitioner's current counsel now argues that in several important respects, Texas substantive law is not as it was previously conceded and argued by Petitioner to be. Having become dissatisfied with the

[6] Following the initial appellate decision, Petitioner sought a Rehearing with a Suggested Rehearing *en banc*, which was denied. Petitioner, supported by amicus, filed a Motion to Recall the Mandate which was granted. Thereafter, the Fifth Circuit, in all important particulars, expanded on and reaffirmed its earlier decision. Petitioner has now filed another Petition for Rehearing and another Suggested Rehearing *en banc*.

[7] Petition For A Writ of Certiorari, p. 3.

results obtained from his previous theories of the requirements of Texas law to impose a constructive trust, Petitioner now states that those previously recognized "requirements" in fact do not even exist.

None of the arguments now made by Petitioner falls within the purview of those questions which will normally give rise to granting review on writ of certiorari (Supreme Ct. Rule 17.1(a)), inasmuch as there is no conflict between the decisions of the Fifth Circuit and any decision of the Texas Supreme Court (or, for that matter, of this Court). As can be seen from the truncated Statements of the Case contained in the Petition and this Response, as well as the far more detailed statements reflected in the two opinions of the court of appeals, the determination of the merits of this case is highly dependent upon a full appreciation of the *entire* factual record developed in the trial. Both decisions of the court of appeals reflect an intimate intertwining of the facts of the case (those specifically found by the trial court and those which are undisputedly in the trial record) with the case law of Texas.

Put another way, the Petitioner merely requests that this Court grant a writ of certiorari to review the full evidentiary record and inferences that might be drawn and substitute its judgment of the facts for that reflected in the two appeals court opinions. This does not form a sufficient basis for issuance of a writ of certiorari.[8] The petition, when stripped of its excess verbiage, presents the question of whether there is sufficient evidence of a substantial and long-term confidential relationship between two business associates to support imposition of a constructive trust on real property, title to which is held by one. This is just the type of factual inquiry into which this Court has repeatedly declined to engage.[9]

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[8] *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938).

[9] *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

II. The Decisions of the Fifth Circuit In This Case Correctly Interpret the Substantive Texas Law Regarding Constructive Trusts.

Texas law requires that a contract to convey real property be in writing to be enforceable. Tex. Bus. & Com. Code Ann. §26.01 (Vernon 1968). The Texas Trust Act, Art. 7525b-1 V.R.C.S. provides that no trust may be established except by written instrument. Petitioner's claims clearly fall within the provisions of these statutes of frauds, and unless an exception can be found, Petitioner's claims are unenforceable.

Texas courts have long recognized and resorted to the device of constructive trusts to remedy wrongs committed by one who has occupied a long standing position of trust and confidence and who would otherwise be unjustly enriched.[10] However, the mere incantation "contructive trust" does not abrogate the efficacy of the statute of frauds. Rather, it sets the court on a searching factual inquiry to determine whether there has been a long standing relationship of trust and confidence prior to and separate from that transaction in which a constructive trust is sought.[11] The relationship must be sufficient to give rise to a foundation for believing that one need not look out for one's on affairs—trusting that the other person will act only in the confider's best interest *and* there must be a showing that the party breaching that trust will be thereby unjustly enriched.[12]

Respondents have not found and Petitioner has not cited a single Texas case where a constructive trust was imposed upon business associates where either of those requirements was absent. Petitioner cites (at p.8) two Texas cases for the proposition that the court of appeals clearly erred by holding

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[10] *See Rankin v. Naftalis*, 557 S.W.2d 940 (Tex. 1977); *Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974); *Tyra v. Woodson*, 495 S.W.2d 211 (Tex. 1973).

[11] *Sentry Title Co., supra* at 946; *See also Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966).

[12] *Rankin v. Naftalis, supra* at 944.

that a prior relationship "as a matter of law" must be a " . . . long standing fiduciary or confidential, trusting relationship unrelated to the subject transaction." Neither case supports Petitioner's contention.

Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980), is a case dealing solely with the principal of election of remedies. It has nothing whatsoever to do with the standards or criteria for imposing a constructive trust. Indeed the only reference in the entire case to the constructive trust doctrine occurs in a passing reference to various equitable doctrines similar to the election of remedies doctrine. *Edwards v. Strong*, 213 S.W.2d 979 (Tex. 1948), while concededly a constructive trust case, is no more enlightening as to the standards which will be applied to allow a constructive trust claim to defeat a defense based on the statute of frauds, for the simple reason that the Defendant in that case failed to plead the statute of frauds as a defense, and thus could not assert it on appeal.

It is necessary to turn to those Texas cases in which constructive trust claims are analyzed in light of the principals underlying the statute of frauds in order to determine the status of applicable Texas case law. This is the very analysis which the court of appeals has now undertaken in this case on two occasions.

The court of appeals recognized that the imposition of a constructive trust is an equitable remedy and that "there is no 'unyielding formula' for determining whether a constructive trust exists on the facts of a particular case."[13] The court twice made an exhaustive analysis of the controlling Texas statutory and case law and then correctly applied that law to the facts in this case. A cornerstone of the constructive trust theory is that "there must be a fiduciary relationship before, and apart from,

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[13] *Sentry Title Co., supra* at 946; *See also Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974).

the agreement made the basis of the suit."[14] *Consolidated Gas & Equipment Co.* is a leading Texas Supreme Court decision directly on point, to which the Petitioner devotes scant attention. The court noted that a prior existing relationship could give rise to a fiduciary obligation "when, over a long period of time, the parties had worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced." *Consolidated Gas & Equipment Co., supra* at 337.

Petitioner claims that it is illogical for a prior relationship to be "separate" from the subject transaction, yet "within the scope of the parties' prior dealings."[15] This merely means that the prior dealings must be completely separate from the subject transaction. In other words, the earlier transaction must not be connected with the subject transaction; otherwise there would be no basis for a fiduciary relationship. One continuous transaction or plan will not suffice to form a fiduciary relationship. Morever, the prior dealings must also be of the same type as the subject transaction.[16] More significantly, Petitioner has, up to the time this Petition was filed, clearly argued that this requirement not only existed, but was met by Petitioner. On no less than four occasions Petitioner argued that a "confidential or trust relationship" between Ward and Whatley arose prior to and separate and apart from the Dyckman 9 acre tract and easement transaction, through the Dyckman Tract transaction was squarely within the scope of Ward and Whatley's relationship and their plan to acquire the 490 acres for Ward.[17] Indeed,

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[14] *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966) (hereinafter referred to as *Consolidated Gas & Equipment Co.*); *See also Sentry Title Co., supra* at 946; *Accord, Rankin v. Naftalis*, 557 S.W.2d 940 (Tex. 1977); *Tyra v. Woodson*, 495 S.W.2d 211 (Tex. 1973).

[15] Petition for Writ of Certiorari, at 9.

[16] *See Rankin v. Naftalis, supra* at 944.

[17] Post-Trial Brief of Travis Ward, p. 7. See also, Trial Brief of Defendant Travis Ward, pp. 6-7; Original Brief of Appellee, pg. 32; and Supplemental Brief of Appellee, pp. 3,4,5, and 6.

Petitioner stated in his original brief in the Fifth Circuit that "the (Texas) Supreme Court in *Tyra* stated that its prior holdings established that, for a constructive trust to arise, there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit."[18] That statement of the law has been often repeated by the Texas Supreme Court.

> . . . [F]or a constructive trust to arise there must be a fiduciary relationship before and apart from the agreement made by basis of the suit. Such is our holding here. As stated, the fact that one businessman trusts another, and relies upon his promise to carry out a contract, does not create a constructive trust. To hold otherwise would render the Statute of Frauds meaningless. *Consolidated Gas* at 336.

There was no long-standing relationship between Petitioner and Respondent. Prior to 1970, they had met only once. Furthermore, the transactions involving the Dyckman property and the 490 acres are so closely related as to be characterized as part of the same transaction. The court of appeals recognized this fact:

> First, it is clear from the undisputed evidence that the acquisition of the Dyckman tract was part of the overall scheme to acquire the 490 acres. It is of compelling significance in this case that the dealings between Ward and Whatly were not prior, unrelated dealings in real property. Rather they were all part of a single master plan to acquire the 490 acres. Ward and Whatley had had no business dealings with each other prior to the arrangements to acquire the 490 acres. *Sentry Title Co., supra* at 948.

After conceding that Texas substantive law governs this action pursuant to *Erie*, Petitioner then anomolously goes on to argue the applicability of the principals enunciated in this Court's decision in *Robertson v. Chapman*,[19] a pre-*Erie* case. The Court in *Robertson* was not concerned with or governed by

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[18] Original Brief of Appellee, pg. 32.

[19] 152 U.S. 673 (1893).

the applicable state law. Because of *Erie* this Court must be guided solely by Texas law, as was the Fifth Circuit, and thus *Robertson* is of no assistance in determining whether the Fifth Circuit properly applied Texas law.

The Fifth Circuit's opinions exhaustively analyzed the doctrine of constructive trusts under Texas law. That court measured the conduct of the parties in this action against the parameters reflected in no less than a dozen Texas cases. In no case cited by Petitioner have Texas courts imposed a constructive trust on such scant evidence of a confidential relationship as was presented by Petitioner in the trial of this case.

Petitioner's argument that a principal-agent relationship was formed between the parties is similarly without merit. If the only requirement for the imposition of a constructive trust is a claim of a principal-agent relationship based on oral agreements, then the statute of frauds would be a nullity. The entire thrust of the statute of frauds is that oral agreements to convey land are not enforceable.[20] No Texas case has been cited that stands for the Petitioner's proposition. Indeed, a similar argument has been made and rejected by the Texas appellate courts.[21]

Petitioner misinterprets and distorts the discussion of unjust enrichment in the appeals court opinions. Petitioner focuses on whether Petitioner had "unclean hands" and not on whether Respondent would be unjustly enriched.[22] The question that must be answered is whether the alleged wrongdoer would be unjustly enriched if allowed to keep the proceeds.[23] The Fifth Circuit did not hold that Petitioner's unclean hands barred his equitable claim, as is suggested in the petition. The court did state that it was "... questionable whether Ward's

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[20] *Sentry Title Co., supra* at 949.

[21] *See, e.g., Cooks v. City of Plano*, 656 S.W.2d 607 (Tex. App.—Dallas 1983).

[22] Petition for Writ of Certiorari at 9-10.

[23] *Rankin v. Naftalis, supra* at 944.

concealment and schemes in this deal generally leave him with the requisite clean hands for equitable relief."[24] The significance of the Fifth Circuit's discussion of unjust enrichment lies, however, in the statement that "[t]he mere fact that one party has made a profit, though, is an insufficient ground to order restitution on a theory of unjust enrichment. The profit must be "unjust" under principals of equity."[25] The facts clearly indicate that Respondent would not be unjustly enriched.[26] Home Engineering was liable on the note and paid all interest payments on the note.[27] Home Engineering managed the property and rendered it for property taxes. As the court stated "there has been no *unjust* enrichment in this case."

Petitioner raises for the first time on appeal the issue of resulting trust. The issue was not briefed or discussed at any point of the proceedings in the Fifth Circuit, having been abandoned after being raised at the District Court level. Even so, the court of appeals correctly disposed of this issue. A resulting trust will not be created "unless the payments are made pursuant to an *enforceable agreement* upon the part of the beneficiary existing at the time the deed is executed."[28] There was no such enforceable agreement in this case or "shared intent" to create such an agreement.[29]

Petitioner's reliance on *Omohundro v. Matthews,* 341 S.W.2d 401 (Tex. 1960), is misplaced. In *Omohundro* the parties had engaged in numerous joint venture oil and gas lease acquisitions. They had previously owned the property in question jointly and were continuing to engage in other property purchases together. The Defendant purposely allowed the lease on the jointly owned property to expire and then acquired

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[24] *Sentry Title Co., Inc., supra* at 950.

[25] *Id.* at 949.

[26] *Id.* at 949-50.

[27] *Id.* at 950.

[28] *Bybee v. Bybee,* 644 S.W.2d 218, 221 (Tex. App.—Fort Worth 1982, no writ) (emphasis added).

[29] *Sentry Title Co., supra* at 946.

the lease in his own name. The facts in the *Consolidated Gas*, case, *supra*, are however, virtually identical to those in the instant case. In *Consolidated* the Texas Supreme Court reversed the trial court's imposition of a constructive trust and held that:

> The fact that people have had prior dealings with each other and that one party subjectively trusts the other does not establish a confidential relationship. Thigpen v. Locke, supra. That opinion reasoned that "[b]usinessmen generally do trust one another, and their dealings are frequently characterized by cordiality * * *." The dissent in *Thigpen* recognized that fact; but took the view that over the long period of years, a relationship of financial advisor and confidante had arisen between a trust officer of a bank and his friend, a customer of the bank, which raised an issue of fact as to a confidential relationship.
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> * * *
>
> This Court in Gaines v. Hamman, supra, as well as in Thigpen v. Locke, supra, recognized that a fiduciary relationship could arise outside of those relationships listed above when, over a long period of time, the parties had worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced. The proof in this case simply does not show such a relationship of the parties as to come within the exceptions recognized in the *Gaines* and *Thigpen* opinions. There is no constructive trust. 405 S.W.2d at 336-37.

III. The Decision of the Fifth Circuit Is In Compliance With the Federal Rules of Civil Procedure and Established Judicial Policy.

Section 2 of Petitioner's argument reflects a lack of understanding of the court of appeals decision. Rule 52(a) was followed by the Court. The court of appeals did not challenge the trial court's findings of fact; thus Petitioner's argument concerning Rule 52(a) is largely irrelevant. The Rule does not

apply when the trial court interprets the law incorrectly.[30] Rather, the circuit court set aside certain conclusions of law relied upon by the district court.[31] The court of appeals held that the "district court erred in finding a pre-existing confidential relationship between Ward, Whatley, and Hart prior to and separate from the Dyckman transactions."[32]

Accepting the district court's essential factual findings, there remains no findings or evidence of a long standing relationship of trust and confidence built on a series of transactions which the Texas courts have always required to impose a constructive trust on business associates. Similarly, there is no evidence which would support a finding that Respondent will be unjustly enriched in this case.

It is Petitioner who refused to become liable on the notes given for the properties involved, including the Dyckman Tract. It is Petitioner who wanted to hide his name and not have it associated with these deals. Respondent signed the note, made the interest payments and rendered the property for tax purposes. Thus, the appellate decision correctly concluded that Respondent was not being unjustly enriched.

Petitioner also uses fallacious reasoning in stating that because the facts establish a constructive or resulting trust, then reversal is prohibited by Rule 52(a). The fallacy is that the facts in this case did not support either type of trust. The plain and simple fact is that the district court improperly applied the law to the facts. The district court finding of unjust enrichment was a conclusion of law[33] and may be set aside by the Court of Appeals without regard to Rule 52(a). A careful reading of the Court of Appeals decisions shows that the Court correctly applied the controlling Texas law to the facts in this case.

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[30] *See Johnson v. Uncle Ben's, Inc.*, 617 F.2d 419 (5th Cir. 1980); *Grant v. Smith*, 574 F.2d 252 (5th Cir. 1978).

[31] *Sentry Title Co., supra* at 948-50.

[32] *Id.* at 950; *Harris v. Sentry Title Co.*, No. 82-1108, slip op. at 2803 (5th Cir. Mar. 12, 1984) (second opinion).

[33] District Court Conclusion of Law No. 7.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Original signed by
J. Albert Kroemer

By: _____
(Counsel for Respondent)

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 1984, I served copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari on the several parties hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

1. Hiram C. Eastland, Jr., Esq.
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   Royalty Owners Association.

I further certify that all parties required to be served have been served.

Original signed by
J. Albert Kroemer

J. Albert Kroemer